Petition

81-1032

No.

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
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In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

SELLS ENGINEERING, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an attorney serving in the Civil Division of the United States Department of Justice engaged in preparing a civil fraud action under the False Claims Act is "an attorney for the government * * * perform[ing] * * * such attorney's duty" within the meaning of Federal Rule of Criminal Procedure 6(e)(3)(A)(i), and accordingly is entitled to examine relevant grand jury material without judicial authorization.

2. Whether (i) Department of Justice attorneys engaged in preparing a civil fraud action under the False Claims Act, if not entitled to access to grand jury material without judicial authorization, and (ii) any support or technical personnel needed to assist such attorneys, must demonstrate a "compelling and particularized need" in order to obtain access to grand jury material.

PARTIES TO THE PROCEEDING

The respondents, in addition to Sells Engineering, Inc., are Peter A. Sells and Fred R. Witte.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-19a) is reported at 642 F.2d 1184. The oral opinion of the district court (App. D, *infra*, 22a-24a) and the district court's order (App. E, *infra*, 25a-26a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 20a) was entered on April 2, 1981, and a petition for rehearing was denied on August 6, 1981 (App. C, *infra*, 21a). On October 27, 1981, Justice

Rehnquist extended the time in which to file a petition for a writ of certiorari until December 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

FEDERAL RULES INVOLVED

1. Federal Rule of Criminal Procedure 6(e) provides in pertinent part:

> **Recording and Disclosure of Proceedings.**
>
> * * * * *
>
> (2) **General Rule of Secrecy.**—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.
>
> (3) **Exceptions.**
>
> (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—
>
> (i) an attorney for the government for use in the performance of such attorney's duty; and
>
> (ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance

of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

2. Federal Rule of Criminal Procedure 54(c) provides in pertinent part:

Application of terms. As used in these rules the following terms have the designated meanings.

* * * * *

"Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney * * *.

STATEMENT

1. In May 1977, a federal grand jury was convened in the Southern District of California to investigate possible criminal conduct by respondents Peter A. Sells, Fred R. Witte, and Sells Engineering, Inc. (App. A, *infra*, 2a). Both Witte and Sells were officers of Sells Engineering, Inc. That company had contracts with the United States Navy to produce airborne electronic devices designed to interfere with enemy radar systems.

In April 1978, the grand jury indicted respondents along with other persons on two counts of conspiracy to defraud the United States (18 U.S.C. 371) and nine counts of tax fraud (26 U.S.C. 7206 (2)) (App. A, *infra*, 2a). The indictments described a scheme under which Sells made and concealed false entries on the books of Sells Engineering. Sells and Witte then used other corporations they controlled to submit fictitious invoices to Sells Engineering, which Sells and Witte represented to be genuine. The purpose of the conspiracy was to conceal use of corporate funds for personal purposes and to overcharge the United States under the defense contracts (C.R. 99-100, 497-504).[1]

Sells and Witte moved to dismiss the indictments, alleging that the government had misused the grand

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[1] "C.R." denotes the complete original record on appeal in the court of appeals.

jury for civil tax purposes.[2] In response, the Assistant United States Attorney who assisted the initial stages of the grand jury investigation filed an affidavit affirming that (C.R. 183):

> [A]t no time was the grand jury used to obtain documents in furtherance of a civil investigation. At all times the sole purpose of resorting to the grand jury process was to determine the existence of potential criminal liability on the part of the subjects of the investigation.

A different Assistant United States Attorney who assisted the final stages of the grand jury investigation similarly affirmed that he had "not used the grand jury process to obtain evidence for use in civil administrative investigations or litigation" (C.R. 328).

In December 1978, pursuant to a plea bargain, Sells and Witte pleaded guilty to one count of conspiracy to defraud the United States (App. A, *infra*, 2a-3a). As part of this plea bargain the other counts of the indictment against Sells and Witte, as well as all counts against Sells Engineering, were dismissed.

2. Shortly before Sells and Witte entered their guilty pleas, the United States Department of Justice sought an order under Fed. R. Crim. P. 6(e)

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[2] Prior to the commencement of the grand jury proceedings, the Internal Revenue Service had conducted a separate investigation of Sells, Witte, and Sells Engineering. During this IRS investigation, respondents received and resisted administrative summonses. The United States District Courts for the Central and Southern Districts of California enforced all but one of the summonses. Enforcement was stayed pending respondents' appeal from the enforcement orders. The court of appeals ultimately remanded the enforcement cases in light of the pendency of the grand jury proceedings described above, which by then had commenced. See App. A, *infra*, 2a n.1.

from the district court in which the criminal charges were pending that would authorize disclosure of grand jury transcripts and documents considered by the grand jury to attorneys serving in the Civil Division of the Department and to support personnel assisting them. The Civil Division requested the material in order to determine whether to file a civil suit under the False Claims Act (31 U.S.C. 231 *et seq.*) against persons indicted by the grand jury. The Civil Division needed the material promptly because it feared that the statute of limitations might otherwise expire before it could determine whether grounds for a suit existed (Tr. of Dec. 7, 1978 at 6, 26).

One week later, the district court accepted the guilty pleas tendered by Sells and Witte, who also withdrew their allegation of grand jury abuse (Tr. of Dec. 15, 1978 at 40, 60).[3] Several days thereafter, the district court held a hearing on the Civil Division's request for access to grand jury transcripts and documents. Attorneys for respondents appeared and opposed that motion, renewing their claims of grand jury abuse. The government objected to the presence of respondents' attorneys at the hearing and specified that its request covered all the material that had been before the grand jury investigating respondents. The government claimed access for Civil Division attorneys engaged in False Claims Act investigations as of right under Fed. R. Crim. P. 6(e)(3)(A)(i) and sought disclosure to personnel assisting the Civil Division attorneys under Rule 6(e)(3)(C)(i) (Tr. of Dec. 18, 1978 at 77-79).

The district court granted both branches of the government's request for disclosure (App. D, *infra*,

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[3] The grand jury had also indicted two other individuals, Robert Tucker and Richard Teerlink. Tucker was convicted after trial and Teerlink pleaded guilty.

22a-24a). Relying on the Fifth Circuit's decision in *In re Grand Jury* (*LTV*), 583 F.2d 128 (1978), the court held that Civil Division attorneys are "attorneys for the government" entitled to view grand jury material relevant to their duties, without judicial authorization, under Rule 6(e)(3)(A)(i). The court also found that the government had shown a particularized need for the relevant information in that it had "demonstrated that the grand jury materials are rationally related to civil matters within the duty of the attorney for the government" (App. D, *infra*, 23a). The court concluded that it was not required to rule upon the allegations of grand jury abuse made by respondents because they had been withdrawn when Sells and Witte pleaded guilty. Nonetheless, the court stated that it "would have ruled that there was no abuse of the grand jury process" (*id.* at 24a). The court accordingly authorized disclosure to Justice Department attorneys and assisting personnel (App. E, *infra*, 25a-26a) and denied respondents' motion to stay disclosure.

Respondents secured an interim stay of disclosure through January 15, 1979 from a single circuit judge. They then appealed the district court's order to the Ninth Circuit. On February 27, 1979, a panel of two circuit judges vacated the earlier stay order and refused any further stay. Following this order, Civil Division attorneys and assisting personnel gained access to the grand jury material through the United States Attorney's office. In September 1979, the Department of Justice filed a civil suit in the United States District Court for the Southern District of California against Sells, Witte, Sells Engineering, and others under the False Claims Act[4] and at common

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[4] This statute provides that any person filing a false claim with the government or defrauding the United States is liable

law, seeking recovery of amounts they had overcharged the United States on their contracts.

3. On April 2, 1981, after Civil Division personnel had had access to the grand jury material for more than two years, a divided panel of the court of appeals reversed the district court's disclosure order (App. A, *infra*, 1a-19a).[5] Although the court of appeals recognized that the Fifth Circuit and several district courts had ruled otherwise, it held that grand jury material could not be disclosed to Civil Division attorneys in the absence of a court order (*id.* at 9a-14a). The court based this holding on its view that such disclosure "might irresistibly encourage use of the grand jury as a tool of civil discovery" (*id.* at 12a) and on its analysis of the history of Rule 6(e), which (the court believed) showed that disclosure to government attorneys was limited to attorneys engaged in criminal prosecution (*id.* at 10a-12a).

The court of appeals further held that in order to obtain access to grand jury material, both Justice Department civil attorneys and personnel assisting them must make a showing of "particularized and

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for $2,000 and double the amount of the loss imposed upon the government, plus the government's costs of suit. 31 U.S.C. 231.

[5] At the threshold, the court of appeals held that, in the circumstances of this case, the disclosure order was appealable under 28 U.S.C. 1291 (App. A, *infra*, 5a-6a); that, notwithstanding Civil Division personnel's two years of access to the materials at issue, the case was not moot because of the possibility of disclosure to additional individuals (*id.* at 6a-7a); and that the challenge to disclosure was ripe and could properly be pressed in an appeal from the disclosure order, rather than in the government's civil action (*id.* at 7a).

compelling need"—the standard that governs release of such material to a private party for civil litigation (App. A, *infra*, 14a-17a). Because the district court had employed a "rational relationship" standard to determine whether disclosure should be granted, the court of appeals remanded the case for further consideration on this point.

Finally, although recognizing that the legislative history of congressionally enacted amendments to Rule 6(e) indicates that any hearing upon a government disclosure request should be conducted ex parte so as to preserve grand jury secrecy, the court of appeals prescribed adversary proceedings on remand to allow respondents' attorneys to be heard in opposition to the government's request, to the extent that the particular grand jury materials involved were documents belonging to respondents (App. A, *infra*, 17a).[6]

District Judge Curtis, sitting by designation, dissented. He concluded that the case was moot in light of Civil Division attorneys' two years of access to the disputed material, and he suggested that respondents' only remedy lay in the pending civil action, where they might move to suppress evidence if appropriate (App. A, *infra*, 18a-19a).

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning Rule 6(e) of the Federal Rules of Criminal Procedure, which governs disclosure of grand jury material. The court of appeals has held that disclosure of grand

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[6] The court of appeals also directed the district court to consider whether respondents' counsel were entitled to be heard in opposition to disclosure of other documents with which respondents were already familiar (App. A, *infra*, 17a-18a).

jury material to Department of Justice attorneys in connection with civil litigation requires judicial authorization and that the standard for authorizing disclosure to such attorneys and to personnel assisting them is the same as that applicable to requests by private litigants. This decision conflicts with the decision of another court of appeals and will seriously disrupt the government's efforts to enforce civil statutes, such as the False Claims Act and prohibitions against bribery, tax evasion and conflicts of interest, that have criminal law overtones.

1. Rule 6(e) of the Federal Rules of Criminal Procedure establishes a general rule of secrecy respecting grand jury proceedings. Except as specifically authorized, the Rule prohibits disclosure of "matters occurring before [a] grand jury" by anyone, other than a witness, who has a right of access to such proceedings. Fed. R. Crim. P. 6(e)(2). A knowing violation of this rule is punishable as a contempt of court. *Ibid.* Among the exceptions expressly established in the Rule, however, is Fed. R. Crim. P. 6(e)(3)(A)(i), which authorizes disclosure of "matters occurring before the grand jury, other than its deliberations and the vote of any grand juror" to "an attorney for the government for use in the performance of such attorney's duty." Fed. R. Crim. P. 54(c) defines an "attorney for the government" for the purpose of the criminal rules to include "an authorized assistant of the Attorney General." By statute and regulation, attorneys assigned to the Civil Division of the United States Department of Justice, like attorneys elsewhere in the Department, are authorized assistants of the Attorney General. See 28 U.S.C. 509, 510, 515-517; 28 C.F.R. 0.13 and 0.45. The duties of such attorneys include prosecu-

tion of civil fraud actions under the False Claims Act. See 28 C.F.R. 0.45(d). Accordingly, as the Fifth Circuit recognized in *In re Grand Jury (LTV)*, 583 F.2d 128, 130 (1978),[7] the plain language of Rule 6(e)(3)(A)(i) compels the conclusion that Civil Division attorneys were entitled, as of right, to disclosure of the grand jury transcripts and documents sought in this case.[8]

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[7] There is also a conflict among the federal district courts on this issue. Compare *In re Grand Jury Proceedings, Misc. No. 80-56 P*, 505 F. Supp. 978, 982 (D. Me. 1981); *State of Washington* v. *American Pipe & Construction Co.*, 41 F.R.D. 59, 62 (S.D. Cal. 1966); *United States* v. *General Electric Co.*, 209 F. Supp. 197, 198-202 (E.D. Pa. 1962); and *In re Petroleum Industry Investigation*, 152 F. Supp. 646, 647 (E.D. Va. 1957), with *In re Grand Jury*, 82 F.R.D. 70, 73 (N.D. W.Va. 1979); and *Capitol Indemnity Corp.* v. *First Minnesota Construction Co.*, 405 F. Supp. 929 (D. Mass. 1975). The last case is distinguishable from the others cited because the court there found that disclosure would actually be to a government agency not covered by Rule 54(c). In addition, in *In re April 1956 Term Grand Jury*, 239 F.2d 263, 271-273 (7th Cir. 1956), the Seventh Circuit ruled that government personnel could not view grand jury materials, but based its decision on the belief that such materials could not be used to prepare a civil case. This opinion preceded this Court's decision in *United States* v. *Procter & Gamble*, 356 U.S. 677 (1958), which effectively disapproved the rationale of the Seventh Circuit.

[8] There is reason to question whether the documents sought here—as opposed to the grand jury transcripts—were "matters occurring before the grand jury" and hence subject to the general rule of secrecy established by Fed. R. Crim. P. 6(e)(2). The purpose of the secrecy rule is to prevent disclosure of anything that will reveal what occurred in the grand jury proceedings. See, *e.g.*, *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960); *United States* v. *Stanford*, 589 F.2d 285, 290-291 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979). Documents generated outside the grand jury are not converted into grand jury material simply because they have been subpoenaed by the

The court of appeals, however, construed Rule 6(e)(3)(A)(i) as limiting disclosure to "attorneys for the government" engaged in criminal prosecution

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grand jury, because disclosure of such documents need not reveal the grand jury proceedings. *In re Grand Jury Investigation*, 630 F.2d 996, 1000-1001 (3d Cir. 1980); *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1382-1383 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980); *United States* v. *Stanford*, *supra*, 589 F.2d at 291; *United States* v. *Interstate Dress Carriers, Inc.*, *supra*, 280 F.2d at 54. Many of the documents sought in this case were government agency documents (see Tr. of Dec. 7, 1978 at 6; Tr. of Dec. 18, 1978 at 77). Such documents may in no event be deemed grand jury material. On the other hand, the government's disclosure request ultimately encompassed all documents considered by the grand jury, identified as such (see Tr. of Dec. 18, 1978 at 77), and the district court's disclosure order encompassed "all documents and exhibits presented to * * * the federal grand jury" (App. E, *infra*, 25a). At least one court of appeals has suggested that a request framed in such terms would relate to "grand jury matters." *United States* v. *Stanford*, *supra*, 589 F.2d at 291 n.6; see also *In re Special February, 1975 Grand Jury (Baggot)*, 652 F.2d 1302, 1305-1308 (7th Cir. 1981); *In re Special February, 1975 Grand Jury (Baggot)*, No. 80-1999 (7th Cir. Nov. 20, 1981) (supplemental opinion); but see *United States* v. *Saks & Co.*, 426 F. Supp. 812 (S.D.N.Y. 1976).

The government did not argue below that the documents sought were outside the reach of Rule 6(e)(2), and the court of appeals did not address that question. We therefore assume for purposes of this case that the documents at issue are subject to the rules governing grand jury secrecy. We note as well that the Judicial Conference's Advisory Committee on the Federal Rules of Criminal Procedure has proposed amendments to Rules 6(e)(2) and 6(e)(3)(C) to clarify the status of documents that are considered or subpoenaed by a grand jury. Committee on Rules of Practice and Procedure, *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure* 1, 2-3, 5-6, 8-10 (Oct. 1981).

(App. A, *infra*, 13a). In support of its interpretation, the court below cited the Advisory Committee Notes accompanying Rule 6(e) as first promulgated in 1946, similar notes accompanying an amendment to the rule proposed in 1976, and the legislative history of amendments to Rule 6(e) as enacted by Congress in 1977. These materials do not support the court of appeals' restrictive interpretation of Rule 6(e)(3)(A)(i).

The Advisory Committee Notes accompanying Rule 6(e) as originally promulgated indicate the drafters' intention to continue traditional practices respecting disclosure. 18 U.S.C. App., at 1411. However, no rigid separation between attorneys with criminal prosecution duties and those with civil law enforcement duties has ever been maintained in the United States Department of Justice or the United States Attorney's offices. See 5 U.S.C. (1940 ed.) 310. Indeed, several units of the Department and attorneys in many of the United States Attorney's offices have both civil and criminal law responsibilities. Nor is any such separation between criminal and civil law enforcement required by law. See 28 U.S.C. 510, 515(a) and 519. Accordingly, there is no reason to believe that the drafters of Rule 6(e) intended to limit disclosure to attorneys engaged in criminal prosecution duties when they adopted the phrase "attorney for the government."

As the court of appeals noted (App. A, *infra*, 10a), the 1946 Advisory Committee Note also states (18 U.S.C. App., at 1411) that

> Government attorneys are entitled to disclosure of grand jury proceedings * * * inasmuch as they may be present in the grand jury room during the presentation of evidence.

This comment does not reflect an intent to restrict disclosure to those actually engaged in criminal prosecution duties. Use of grand jury materials in civil proceedings is permissible where the materials are not the product of abusive use of the grand jury intended to further the civil proceedings. *United States* v. *Procter & Gamble*, 356 U.S. 677, 683-684 (1958).[9] Given the practice of assigning criminal and civil litigation arising from a common factual nexus to a single attorney or group of attorneys, a practice that we believe may have been more common in 1946 than it is today, the Advisory Committee simply had no occasion to comment upon disclosure of grand jury materials to government attorneys responsible for civil litigation. The brief and ambiguous statement of the Advisory Committee should not be read to overrule the plain language of Rule 6(e)(3)(A)(i) coupled with Rule 54(c). In any event, because related criminal and civil litigation may be, and often is, assigned to a single attorney, the court of appeals' interpretation of Rule 6(e) would not necessarily tend to preclude grand jury abuse, as the court of appeals assumed (App. A, *infra*, 12a).

The court of appeals' reliance (App. A, *infra*, 10a-11a, 13a) on the 1976 Advisory Committee Note and the legislative history of the 1977 amendment to

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[9] *United States* v. *Procter & Gamble*, *supra*, may be read to approve disclosure to attorneys with civil law enforcement responsibilities. No disclosure order was sought in that case (see 356 U.S. at 685 (Whittaker, J., concurring)), yet the Court upheld the use of grand jury material in civil litigation, absent a showing of grand jury abuse. See *id.* at 683-684. There is no indication in *Procter & Gamble* that the government attorneys employing the material at issue to prepare a civil suit were the same as those who had assisted the grand jury.

Rule 6(e) is equally unavailing. Attention at that time was focused on a problem distinct from the question in this case: the terms on which grand jury material might be disclosed to technical experts, including non-lawyers and persons outside the Department of Justice, whose assistance was required by prosecuting attorneys. Although there was some passing reference in the debates to civil use of grand jury material generally, there is no indication that Congress intended to preclude disclosure to government attorneys with civil law enforcement responsibilities. Indeed, insofar as any inference may be drawn, it appears that Congress, by failing to clarify the Rule, approved existing practices in this regard.

The amendment to Rule 6(e) proposed by the Advisory Committee and transmitted by this Court to Congress would have provided for disclosure to support personnel by introducing into the Rule the following definition of the phrase "attorney for the government":

> For purposes of this subdivision, "attorneys for the government" includes those enumerated in Rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties.

See 425 U.S. 1161 (1976). Although the drafters of the proposed rule urged vigilance against abusive use of a grand jury for civil litigation ends, 18 U.S.C. App. (Supp. III), at 1661, there was no suggestion that the new rule would bar disclosure of grand jury material already in existence to government attorneys for use in civil law enforcement. Rather, the proposed incorporation of Rule 54(c) by reference supports a contrary assumption.

The House of Representatives disapproved the proposed amendment and deferred any substantive change in Rule 6(e) until a comprehensive grand jury reform program could be considered. The focus of the House Committee's concern was on disclosure to non-Department of Justice personnel; there was no mention of disclosure to government attorneys. See H.R. Rep. No. 95-195, 95th Cong., 1st Sess. 3-5 (1977). The Senate, however, was not content to await further legislation, and, with the acquiescence of the House, enacted the provisions that became the present Rules 6(e)(3)(A)(ii) and 6(e)(3)(B), which affirmatively authorize disclosure to support personnel and experts whose assistance is needed by government attorneys for criminal prosecution purposes. Rather than disapproving the Advisory Committee proposal, the Senate Committee merely suggested a need for clarification, which prompted its reformulation of the Committee proposal. See S. Rep. No. 95-354, 95th Cong., 1st Sess. 6-8 (1977). There is no indication, however, that Congress intended to preclude disclosure of grand jury materials to Department of Justice attorneys responsible for civil law enforcement. Indeed, the Senate Report affirms (*id.* at 8):

> There is, however, no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes. On the contrary, there is no reason why such use is improper, assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation.

See also 123 Cong. Rec. 25196 (1977) (remarks of Rep. Wiggins).[10]

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[10] Contrary to the court of appeals' statement (App. A, *infra*, 13a), nothing in the Senate Committee Report "implies

The court of appeals also rested its restrictive interpretation of Rule 6(e)(3) on the general policy of grand jury secrecy and the concern that a contrary decision would encourage grand jury abuse (see App. A, *infra*, 12a). But, as the court of appeals itself recognized (*id.* at 16a), most of the policies underlying grand jury secrecy that were delineated in *United States* v. *Procter & Gamble*, *supra*, 356 U.S. at 681-682 & n.6, are inapposite here. Where, as in this case, grand jury proceedings and the resulting criminal prosecution have been concluded,[11] there is

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that a court order must be obtained" under Rule 6(e)(3)(C)(i) to authorize the kind of disclosure involved here. The court's statement apparently rests on language in the Committee Report, immediately following that quoted in the text, which reads (S. Rep. No. 95-354, *supra*, at 8; footnote omitted):

> Accordingly, the Committee believes and intends that the basis for a court's refusal to issue an order under * * * [Fed. R. Crim. P. 6(e)(3)] (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be no more restrictive than is the case today under prevailing court decisions.

This language, however, does not indicate that a court order under Rule 6(e)(3)(C) is required to disclose grand jury material to attorneys with civil law enforcement responsibilities. Rather, the Committee's comments treat only the standard to be applied when an order under Rule 6(e)(3)(C) is required—for instance, when the government seeks disclosure to support personnel and technical experts needed to assist in civil litigation.

[11] We understand that this is the typical case. Contemporaneous access to grand jury material by attorneys with civil law enforcement duties may raise more serious concerns, but those are properly the subject of judicial scrutiny for grand jury abuse in any civil proceeding that ensues. There is no evidence that Rule 6(e) was intended to pre-empt that function.

no risk that disclosure will alert potential defendants who may escape, or importune witnesses or grand jurors. Nor, contrary to the court of appeals' suggestion (App. A, *infra*, 16a), is there need here for concern about the good name of those who are investigated but exonerated or about further disclosures that might make future grand jury witnesses hesitant to speak forthrightly. Civil Division attorneys, like their criminal law enforcement counterparts, are Department of Justice employees well aware of their professional and legal obligations not to breach grand jury secrecy, and they have access to the same security arrangements as prosecutors to ensure that secrecy.

Finally, Rule 6(e)(3)(A)(i) was not intended for, and is ill-suited to the task of, preventing abusive use of a grand jury, for the Rule places no direct limit on civil use of grand jury material. *United States* v. *Procter & Gamble*, *supra*, 356 U.S. at 683-684. The Rule clearly permits attorneys who become privy to grand jury material by assisting a grand jury to employ that material for civil litigation purposes, and it does not prohibit the Attorney General from assigning criminal and civil litigation responsibilities arising from a common nucleus of operative facts to a single attorney. Indeed, if it were true, as the court of appeals apparently supposed, that the temptation to abuse the grand jury process is irresistible, and that there are no other adequate safeguards against such abuse, one could only conclude that the court of appeals' interpretation of Rule 6(e)(3) would foster grand jury abuse by *encouraging* such dual assignments. In any event, the district court found no grand jury abuse here (see App. D, *infra*, 24a), and the district courts are not without power to control abusive use of grand jury proceedings in a proper case. See note 11, *supra*.

2. The court of appeals also fashioned (App. A, *infra*, 14a-17a) an unduly restrictive standard to govern release of grand jury materials to persons not entitled to access to such materials as of right. (Of course, in the court of appeals' view, that class includes Civil Division attorneys assigned to enforcement of the False Claims Act, as well as support personnel and persons possessing expertise whose assistance is needed by such attorneys.) The court of appeals' conclusion that "particularized and compelling need" must be shown as a predicate for such disclosure conflicts with the decisions of two other courts of appeals, both of which have deemed it sufficient to show that "the grand jury materials [sought] are rationally related to civil matters within the duty of an attorney for the government and that he requires assistance from the non-lawyers described." *In re Grand Jury (LTV)*, 583 F.2d 128, 131 (5th Cir. 1978); see also *In re Grand Jury Subpoenas*, 581 F.2d 1103, 1110 (4th Cir. 1978), cert. denied, 440 U.S. 971 (1979).

The court of appeals rested this aspect of its decision exclusively upon decisions respecting disclosure of grand jury material to private parties for civil litigation (see App. A, *infra*, 14a). But in *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979), this Court's most recent decision on that subject, upon which the court below relied, this Court carefully framed the question presented as "[W]hat justification for disclosure must a *private party* show in order to overcome the presumption of grand jury secrecy." *Id.* at 213 (emphasis added). The court of appeals, moreover, overlooked substantial considerations that justify the less exacting standard approved by the Fourth and Fifth Circuits.

First, no disclosure order would be required at all if the government's civil case were to be handled by an attorney who assisted the grand jury or otherwise had become privy to grand jury materials through his role in criminal proceedings. Accordingly, no substantial interest of affected parties is protected by the strict test announced by the court below. Instead, like the court of appeals' interpretation of Rule 6(e)(3)(A)(i), the court's ruling serves largely to constrain the Attorney General in his exercise of discretion respecting the allocation of responsibilities within the Department of Justice and the United States Attorney's offices.

Second, the court of appeals failed to consider the substantial public interest in redressing fraud against the United States at stake in civil proceedings such as those brought under the False Claims Act. In *Douglas Oil Co.* v. *Petrol Stops Northwest*, *supra*, 441 U.S. at 223, the Court instructed district courts in ruling upon a private party's motion for disclosure to weigh "the public interest in secrecy" against the private interest in disclosure. But where disclosure is sought by attorneys for the United States in furtherance of their responsibility to protect the public weal, the balancing task is fundamentally different, because the interests pitted against grand jury secrecy are public rather than parochial.

Finally, disclosures *within the government* (unlike disclosures to a private party) raise few of the concerns underlying the requirement of grand jury secrecy. As noted above (pages 13-14, 18, *supra*), Justice Department lawyers assigned to civil litigation often work next door to their colleagues engaged in criminal law enforcement. They are equally cog-

nizant of their responsibilities not to divulge matters occurring before the grand jury to unauthorized persons.

The court of appeals' decision is also contrary to congressional intent. When Rule 6(e) was amended in 1977, the Senate Committee Report on the amendment discussed access by personnel assisting the government for civil uses, citing with approval *United States* v. *Procter & Gamble*, *supra*, and *Robert Hawthorne, Inc.* v. *Director of Internal Revenue*, 406 F. Supp. 1098 (E.D. Pa. 1976) (see S. Rep. No. 95-354, *supra*, at 8 n.13). As noted above (page 14 & note 9, *supra*), in *Procter & Gamble* the Court approved use of grand jury material by Antitrust Division attorneys in a civil action stemming from a grand jury proceeding but denied comparable access to a private party (see 356 U.S. at 683-684). In *Robert Hawthorne, Inc.*, the court authorized access to grand jury matters by government officials on the ground that the grand jury material would remain under the aegis of the Justice Department (406 F. Supp. at 1119 n.35, 1126-1127). Thus, the legislative history of Rule 6(e) reveals that requests for disclosure of grand jury material to persons acting under the auspices of the Justice Department are to be judged by a standard less demanding than "particularized and compelling need." The court of appeals' contrary conclusion warrants this Court's review.[12]

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[12] The court of appeals' decision is also erroneous in another respect, which may warrant this Court's attention in an appropriate case. The court of appeals directed that respondents' counsel be afforded the opportunity to be heard in opposition to the government's disclosure request, at least insofar as the

3. The decision of the court of appeals will seriously disrupt the government's program for enforcement of civil laws respecting fraud, bribery, and conflict of interest involving the United States. The Civil Division of the Department of Justice regularly receives referrals that contain grand jury material (but see note 8, *supra*) from the FBI, the Criminal Division of this Department and the United States Attorneys in these areas of responsibility. These re-

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materials sought are documents that belong to respondents, and possibly with respect to other materials as well. See note 6, *supra*. This directive appears to be irreconcilable with the Senate Report on the 1977 amendments to Rule 6(e), which states (S. Rep. No. 95-354, *supra*, at 8; footnote omitted):

> It is contemplated that the judicial hearing in connection with an application for a court order by the government under subparagraph (3)(C)(i) should be *ex parte* so as to preserve, to the maximum extent possible, grand jury secrecy.

The decision below also conflicts in this respect with *In re Grand Jury (LTV)*, *supra*, 583 F.2d at 131.

The court of appeals evidently assumed that it would prove feasible to segregate the proceedings so as to allow respondents' counsel to be heard as to disclosure of certain items without compromising the secrecy of other documents or of grand jury testimony (see App. A, *infra*, 17a-18a). We doubt this will prove feasible in practice. Contrary to the congressional mandate, the court of appeals' decision fails to give sufficient weight to the possibility that such adversary hearings will lead to a breach of grand jury secrecy. The gravity of that error, however, can only be ascertained in light of this Court's disposition of the two questions presented in this petition, and a resolution of other issues concerning the scope of Rule 6(e) not litigated in this case. See note 8, *supra*. We have accordingly refrained from seeking further review of this aspect of the court of appeals' decision at this time.

ferrals are examined by Civil Division attorneys to determine whether further investigation leading to filing of a civil action is warranted. If an affirmative determination is made, the Civil Division may receive files from the referring agency. Such files often include additional grand jury material. The decision below precludes continuation of this referral system and will accordingly handicap the government's prosecution of civil actions arising out of criminal conduct.[18] Meritorious claims may be abandoned for lack of sufficient information to frame a complaint before the statute of limitations expires. On the

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[18] Unless resolved, the conflict between the Fifth and Ninth Circuits will force the Department of Justice to operate under two different sets of procedures for referrals.

For the information of the Court, we note that the Committee on Rules and Practice of the Judicial Conference has circulated for comment an American Bar Association proposal to amend Rule 6(e)(3)(A)(i) so as to limit disclosure thereunder to government attorneys engaged in criminal prosecution and related duties, and to bar civil use of grand jury material without a prior court order. See Committee on Rules of Practice and Procedure, *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure* VII, 2, 6-7 (Oct. 1981). However, neither the Judicial Conference's Standing Committee on Rules of Practice and Procedure nor the Advisory Committee on Criminal Rules has taken any position on this private proposal at this time. The comment period established by the Judicial Conference respecting the ABA proposal extends through May 15, 1982, and it will necessarily be some time before it can be known what change, if any, may ultimately be made in Rule 6(e) through the rulemaking process. See 18 U.S.C. 3771. Accordingly, the need for review of the court of appeals' decision is not diminished by the pendency of the ABA proposal.

other hand, the decision below will encourage premature filing of suits that may ultimately prove nonmeritorious, so as to make civil discovery techniques available. The court of appeals' decision may also compel the Civil Division to duplicate investigative work performed in connection with a grand jury investigation.

The second branch of the court of appeals' decision will also hamper civil law enforcement. It may be difficult for Department of Justice attorneys to show a "particularized and compelling need" for disclosure of grand jury materials when a case is first referred for evaluation by a United States Attorney or the FBI. Compare *Douglas Oil Co.* v. *Petrol Stops Northwest*, *supra*, 441 U.S. at 222 n.12. This hurdle may well prove insurmountable if particularized and compelling necessity must be shown for both government attorneys and other personnel needed to assist them. Accordingly, the court of appeals' decision may effectively eliminate an important tool for screening and evaluation of cases, prior to filing of a complaint.

The adverse impact of the court of appeals' decision will not be limited to the Civil Division of the Department of Justice. The Antitrust, Tax and Criminal Divisions of this Department may also have occasion to employ grand jury material in a civil proceeding within the scope of their respective areas of responsibility. The same is true of the United States Attorneys' offices. Unless the decision below is overturned, the Department of Justice will be faced with the unpalatable alternatives of reorganization so as to assign the conduct of civil and criminal litigation arising out of a common nucleus of facts to a single attorney or group of attorneys, duplication of grand jury investigative work at considerable expense, or limitation of civil law enforcement activities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1981

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 78-3709

IN RE GRAND JURY INVESTIGATION NO. 78-184
SELLS, INC., PETER A. SELLS, FRED R. WITTE,
APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Argued and Submitted Oct. 9, 1980
Decided April 2, 1981

Appeal from the United States District Court
for the Southern District of California

Before FARRIS and NELSON, Circuit Judges, and CURTIS,* District Judge.

FARRIS, Circuit Judge:

Peter A. Sells, Fred R. Witte, and Sells, Inc., appeal from the district court's order under Federal Rule of Criminal Procedure 6(e) granting the Civil

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* Honorable Jesse W. Curtis Senior Judge for the Central District of California, sitting by designation.

Division of the Department of Justice access to documents, exhibits, and testimony acquired by a federal grand jury. The United States urges us to dismiss the appeal for want of jurisdiction. We uphold appellate jurisdiction and reverse.

In 1974, Special Agent Edwin Wordell of the Internal Revenue Service began a combined civil and criminal administrative investigation of Sells, Witte, and Sells, Inc. He issued administrative summonses for various corporate records of Sells, Inc. Sells, Inc., refused to comply with the administrative summonses. Wordell obtained a district court order enforcing the summonses on July 29, 1975, but his investigation was further delayed by a stay of enforcement pending appeal of the order to this court.[1]

In May 1977 a federal grand jury was convened to investigate whether Sells, Witte, and Sells, Inc., had criminally defrauded the United States or evaded the federal income tax. The grand jury issued summonses to Sells, Witte, and Sells, Inc., for many of the materials previously sought by administrative summonses. On April 13, 1978, the grand jury indicted the three on two counts of conspiracy to defraud the United States, 18 U.S.C. § 371 (1976), and nine counts of tax fraud, 26 U.S.C. § 7206(2) (1976). Pursuant to a plea bargain Sells and Witte

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[1] While that appeal was pending, some of the documents sought were turned over to the grand jury discussed in the following paragraph of text. On October 13, 1978, after learning this, we remanded for reconsideration to the district judge who had ordered enforcement. *United States* v. *Center Glass Co. No. 3*, No. 75-3025 (9th Cir. Oct. 13, 1978). The government did not further pursue enforcement, and the action was dismissed by the district court for lack of prosecution. *United States* v. *Center Glass Co.*, No. 75-0325T (S.D. Cal. dismissed Oct. 9, 1980).

pleaded guilty before another district judge to one count of conspiracy to defraud the government by obstructing an IRS investigation. All other counts against the three defendants were dismissed.

On December 18, 1978, the government moved for disclosure of the grand jury materials to Civil Division attorneys and their assistants for possible civil prosecution. Sells, Witte, and Sells, Inc., objected, alleging grand jury abuse.[2] The district court ruled

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[2] Shortly before the time that Wordell convened the grand jury, the Internal Revenue Manual §§ 9267.4, 9268 (Oct. 1977) provided for debriefing of witnesses testifying to "open-ended" grand juries in IRS investigations:

> 9267.4 "Open-ended" Grand Jury Proceedings
>
> (1) Occasionally, investigations into areas of noncompliance are stymied by a series of reluctant witnesses, and it is not possible to determine the precise limits of the tax violations in terms of defendants and taxable periods. If such investigations become stymied, and it appears that an open-ended grand jury inquiry would probably develop information which would result in prosecution recommendation(s), the special agent should submit a complete report [to his superior] . . . .
>
> . . . .
>
> (5) If the Tax Division concurs in the [special agent's and superior's] request, it will authorize the United States Attorney(s) to institute grand jury proceedings.
>
> (6) Following the appearance of witnesses before the grand jury, the procedures of [Internal Revenue Manual §] 9268 will be followed.
>
> (7) The United States Attorney or the Strike Force Attorney will be advised that jurisdiction of the tax aspects remains with the Internal Revenue Service and the Tax Division, Department of Justice and that prosecutive recommendations under Title 26 will be processed in the regular manner.

[Footnote continued on page 4a]

that it need not reach the issue of abuse because the Civil Division was entitled under Federal Rule of Criminal Procedure 6(e)(3)(A)(i) to the materials

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[3] [Continued]

9268 Secrecy of Grand Jury Proceedings and Disclosures

(1) Following an appearance before a grand jury, such grand jury witness should be interviewed by a special agent in an attempt to obtain the same information which the witness furnished to the grand jury. If the witness cooperates, any question of grand jury secrecy and the Service use of grand jury testimony for both criminal and civil purposes can thus be avoided.

(2) If the witness refuses to respond to the questions asked by the special agent, the United States Attorney should be asked to obtain a court order under Rule 6(e), Federal Rules of Criminal Procedure (18 U.S.C. app.), to authorize the Service use of the grand jury testimony for both criminal and civil purposes. In the event the court declines to sign an order, the Chief should seek the advice of Regional Counsel.

(3) Special agents may have access to information arising from a grand jury investigation and utilize it for criminal investigative purposes. This information cannot be used for civil purposes, however, unless cooperation of the witness is obtained in providing the same information which the witness gave to the grand jury, or it becomes part of a public record, such as in a court proceeding, or a court order is obtained under Rule 6(e), Federal Rules of Criminal Procedure that authorizes the use of the information for civil purposes. Failure to obtain at least one of these and a subsequent disclosure in civil proceedings could result in a possible contempt citation for improper disclosure of grand jury materials.

See generally In re April 1977 Grand Jury Subpoenas, 573 F.2d 936, 941-44 (6th Cir.) *vacated and appeal dismissed on rehearings en banc*, 584 F.2d 1366 (6th Cir. 1978), *cert. denied*, 440 U.S. 934, 99 S.Ct. 1277, 59 L.Ed.2d 492 (1979); 584 F.2d at 1373 (Weick, J., dissenting); *In re Grand Jury Subpoena (Berkovitz)*, 367 F.Supp. 1058, 1060-61 (E.D. Pa.

as a matter of right. Sells, Witte, and Sells, Inc., jointly appeal this decision. On September 17, 1979, the United States filed civil suit against Sells, Witte, and Sells, Inc., under the False Claims Act, 31 U.S.C. §§ 231-235 (1976), and at common law.

I. APPELLATE JURISDICTION

The United States attacks this court's jurisdiction to review the disclosure order, arguing that the order is not a "final decision" within the meaning of 28 U.S.C. § 1291 (1976), but rather an interlocutory order and therefore not immediately appealable. We recognize that appellate courts have shown great reluctance to entertain appeals from Rule 6(e) orders before conclusion of grand jury proceedings. *E.g.*, *In re Grand Jury Proceedings*, 580 F.2d 13, 16-17 & n.4 (1st Cir. 1978). Interruptions caused by interlocutory appeals pose substantial threats to the grand jury process. *Cobbledick* v. *United States*, 309 U.S. 323, 327-28, 60 S.Ct. 540, 542, 84 L.Ed. 783 (1940). One court has dismissed an appeal from a disclosure

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1979) ("validity of these procedures is highly suspect"); R. Fink, *Tax Fraud* §§ 8.04[2], 8.07[4] (1980). The record in this case contains several affidavits attesting to use of a similar procedure. These affidavits form the basis of appellants' claim of grand jury abuse.

After this procedure was attacked in federal district court the IRS and the Justice Department agreed to abandon the procedure. By a series of telegrams sent November 24, 1976, April 11, 1977, and June 2, 1977, the Acting Commissioner rescinded and replaced the IRS's standards for dealing with grand juries. On June 15, 1977, a supplement to the Internal Revenue Service Manual was issued incorporating the changes.

order entered while civil proceedings were ongoing, noting that review could be accomplished by challenging admission of improperly obtained evidence after final judgment. *Baker* v. *United States Steel Corp.*, 492 F.2d 1074, 1078 (2d Cir. 1974).

Here a different situation is presented. At the time of entry of the Rule 6(e) order, criminal proceedings had terminated. It was not until nearly nine months after entry of the order—and fully eight months after filing of this appeal—that the government filed civil suit. In these circumstances, the disclosure order was the result of an independent proceeding. The order here, which conclusively resolved the only issue in that proceeding, is a "final decision" and therefore immediately appealable. *See In re Grand Jury Investigation*, 630 F.2d 996, 999-1000 (3d Cir. 1980); *United States* v. *Sobotka*, 623 F.2d 764, 766 (2d Cir. 1980); *see also Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 233, 99 S.Ct. 1667, 1680, 60 L.Ed.2d 156 (1979) (Rehnquist, J., concurring).

II. MOOTNESS AND RIPENESS

The United States contends that this appeal is moot because many of the grand jury materials in question have already been disclosed to Civil Division attorneys and their assistants. It asserts that even if Sells, Witte, and Sells, Inc., prevail this court will be powerless to accord relief.

We disagree. The controversy here is still a live one. By its terms the disclosure order grants access to all attorneys for the Civil Division, their paralegal and secretarial staff, and all other necessary assistants. Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional

personnel and by the continued access of those to whom the materials have already been disclosed. We cannot restore the secrecy that has already been lost but we can grant partial relief by preventing further disclosure.

The United States also contends that any challenge to use of the materials is premature. It cites several cases suggesting that evidence improperly obtained from a grand jury may be suppressed at a subsequent civil proceeding. *See In re April 1977 Grand Jury Subpoenas (General Motors)*, 584 F.2d 1366, 1370 (6th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 934, 99 S.Ct. 1277, 59 L.Ed.2d 492 (1979); *In re Grand Jury*, 583 F.2d 128, 131 (5th Cir. 1978) (per curiam); *In re Grand Jury Subpoenas*, 581 F.2d 1103, 1110 n.16 (4th Cir. 1978), *cert. denied*, 440 U.S. 971, 99 S.Ct. 1533, 59 L.Ed.2d 787 (1979); *In re Fred R. Witte Center Glass No. 3*, 544 F.2d 1026, 1029 (9th Cir. 1976); *Coson* v. *United States*, 533 F.2d 1119, 1120-21 (9th Cir. 1976) (per curiam); *see also, United States* v. *Penrod*, 609 F.2d 1092, 1097 (4th Cir. 1979), *cert. denied*, 446 U.S. 917, 100 S.Ct. 1850, 64 L.Ed.2d 271 (1980); S.Rep. No. 95-354, 95th Cong., 1st Sess. 7 n.12 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 527, 531 n.12. This fact does not make the present action unripe or premature. This action is a proper means to prevent future disclosure before it occurs; the availability of a motion to suppress in future civil proceedings provides a remedy for improper disclosures that have already occurred. Our decision here and any rulings on remand regarding the propriety of the disclosures will of course be binding in such proceedings, at least upon the parties to this appeal.

III. PROPRIETY OF DISCLOSURE

Federal Rule of Criminal Procedure 6(e), which governs grand jury secrecy, provides in part:

> (2) *General rule of secrecy.* A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. . . .
>
> (3) *Exceptions.*
>
> (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—
>
> (i) an attorney for the government for use in the performance of such attorney's duty; and
>
> (ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.
>
> . . . .
>
> (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

> (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

The United States contends that Rule 6(e)(3)(A)(i) allows disclosure to Civil Division attorneys without court order. It also contends that the district court's disclosure to secretaries, paralegals, and assistants was proper under Rule 6(e)(3)(C)(i). Sells, Witte, and Sells, Inc., dispute both contentions.

A. *Disclosure to Civil Division Attorneys*

Federal Rule of Criminal Procedure 6(e)(3)(A)(i) grants disclosure of grand jury materials to "an attorney for the government for use in the performance of such attorney's duty." Such disclosure is a matter of right; it may be accomplished without court order, *e.g.*, *In re Grand Jury*, 583 F.2d 128, 130 (5th Cir. 1978) (per curiam); *United States* v. *Garcia*, 420 F.2d 309, 311 (2d Cir. 1970) (per curiam). Federal Rule of Criminal Procedure 54(c) provides:

> "Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, [or] an authorized assistant of a United States Attorney....

The United States accordingly contends that the portion of the district court's order that disclosed to Civil Division attorneys was proper, and in fact superfluous.

Sells, Witte, and Sells, Inc., contend that Rule 6(e)(3)(A)(i) applies only to disclosure in aid of criminal, rather than civil, law enforcement. They argue that "such attorney's duty" refers only to the Justice Department's criminal prosecution duty. To support this argument, they refer to the history of enactment of the present version of Rule 6(e).

Rule 6(e) first became effective on March 21, 1946. It entitled attorneys for the government to access to grand jury proceedings other than deliberations and votes of the grand jurors. *Federal Rules of Criminal Procedure*, 327 U.S. 821, 837-38 (1946). The Advisory Committee on Criminal Rules indicated in its accompanying notes that that portion of proposed rule 6(e) continued existing practice. The note stated that the provision for disclosure to attorneys for the government was included because "they may be present in the grand jury room during the presentation of evidence."

Rule 6(e) remained essentially unchanged until 1976 when, because the increasing complexity of grand jury investigations required that United States Attorneys have the technical aid of other government personnel in order to adequately assist grand juries, *see, e.g., In re Grand Jury Investigation (William H. Pflaumer & Sons)*, 53 F.R.D. 464, 468, 475-76 (E.D. Pa. 1971), the Supreme Court recommended amendment of Rule 6(e) to include within the term "attorneys for the government" "such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties." *Amendments to Federal Rules of Criminal Procedure*, 425 U.S. 1157, 1161 (1976). The Advistory Committee on Criminal Rules stated in its notes that "[t]he proposed amendment reflects the

fact that there is often government personnel assisting the Justice Department in grand jury proceedings." *Notes of Advisory Committee on Rules, reprinted in* 18 U.S.C.App., at 413 (Supp. I 1977). Thus, the Committee continued the focus of the exception to the secrecy requirement on governmental employees assisting grand juries in their deliberations.

Before the proposed amendment could take effect, Congress exercised its authority under 18 U.S.C. § 3771 (1976) to modify the proposal. *See* Act of July 30, 1977, Sec. 2, Pub.L.No. 95-78, 91 Stat. 319. Like the Advisory Committee, the Senate and House Committees on the Judiciary noted that modern conditions made the assistance of experts, often agents of the FBI, IRS, or Treasury Department, essential to prosecutors' evaluation of evidence. S.Rep. No. 95-354, 95th Cong., 1st Sess. 6 (1977), *reprinted in* 1977 U.S. Code. & Ad. News 527, 529-30; H.R.Rep. No. 95-195, 95th Cong. 1st Sess. 3-4 (1977). Because of varying judicial interpretations of Rule 6(e), both as then in effect and as proposed, Congress chose to redraft the rule. *See* S.Rep. No. 95-354, 95th Cong., 1st Sess. 7 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 527, 530. The present version does not materially differ from the redraft.

Because of the overriding emphasis on aiding federal prosecutors in their duty of assisting grand jurors, neither the 1946 nor the 1976 Advisory Committee Notes even mention civil use of grand jury materials. The issue did arise in the courts, however, and several federal courts approved access to grand jury materials by United States Attorneys for use in civil enforcement suits. *In re Grand Jury*, 583 F.2d 128, 130 (5th Cir. 1978) (per curiam); *In re Grand Jury Investigation (William H. Pflaumer & Sons)*, 53 F.R.D. 464, 472 (E.D. Pa. 1971);

United States v. *General Electric Co.*, 209 F.Supp. 197, 199, 202 (E.D. Pa. 1962); *Washington* v. *American Pipe & Construction Co.*, 41 F.R.D. 59, 62 (S. & N.D.Cal., D.Hawaii, D.Or. & W.D.Wash. 1966); *In re Petroleum Industry Investigation*, 152 F.Supp. 646, 647 (E.D. Va. 1957). On the other hand, neither the Supreme Court nor this court has ever ruled on the matter.

In construing Rule 6(e), we start with the traditional and fundamental policy of grand jury secrecy. *See generally Goodman* v. *United States*, 108 F.2d 516, 519 (9th Cir. 1939). That policy is especially important here because of the broad investigatory powers of the grand jury:

> It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.

Blair v. *United States*, 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919). Investigation for civil enforcement is relatively limited. In fact, frustration over limitations on civil discovery may have prompted the government to convene the grand jury here. To grant the government an *absolute right* of access to grand jury materials for civil use might irresistibly encourage use of the grand jury as a tool of civil discovery. It would also severely limit court review of any such abuse.

In view of the strength of the secrecy policy, any statutory exception should be construed in the context of the considerations that prompted enactment of the exception. The history of Rule 6(e) shows

that the exception allowing disclosure to attorneys for the government was motivated primarily, if not solely, by the grand jury's need for legal and technical assistance. Accordingly, we are not inclined to extend the "attorney for the government" exception to the secrecy rule beyond disclosure for use in assisting grand juries and related aspects of criminal law enforcement.

The 1977 Senate Report supports this position. It indicates that civil use of grand jury-developed evidence may be accomplished through a subsection C court order. It strongly implies that a court order must be obtained, stating that "there is no reason why such use is improper, assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation." S.Rep. No. 95-354, 95th Cong., 1st Sess. 8 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 527, 532. We hold that Congress intended a court order under subsection C to be the avenue to access to grand jury materials by the government for civil use. The contention of the United States that Civil Division attorneys have an absolute right to access is therefore rejected. *Accord, In re Grand Jury*, 82 F.R.D. 70, 73 (N.D. W.Va. 1979); *see also In re April 1956 Term Grand Jury*, 239 F.2d 263, 272-73 (7th Cir. 1956).

The district court granted access to Civil Division attorneys as a matter of right. Although expressing the opinion that the requirements for a subsection C court order were met, the district court expressly stated that it need not reach the issue. Because we find that Civil Division attorneys enjoy no absolute right of access under subsection A, we must determine whether a court order was proper under subsection C. As previously stated, the subsection C

standards also apply to disclosure to secretaries, paralegals, and assistants.

B. *Propriety of Disclosure Under Subsection C*

Federal Rule of Criminal Procedure 6(e)(3)(C)(i) authorizes a court to order disclosure of matters occurring before a grand jury for use preliminary to or in connection with a judicial proceeding. Initially, we note that the civil enforcement action here is a judicial proceeding. *But cf. United States* v. *Bates*, 627 F.2d 349, 351 (D.C.Cir. 1980) (per curiam) (administrative proceeding before Federal Maritime Commission not a "judicial proceeding").

A court should not order disclosure in violation of the traditional grand jury secrecy except upon a showing of "particularized and compelling need." *E.g., U.S. Industries* v. *United States District Court*, 345 F.2d 18, 21 (9th Cir.), *cert. denied*, 382 U.S. 814, 86 S.Ct. 32, 15 L.Ed.2d 62 (1965); *see Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 222-23, 99 S.Ct. 1667, 1674-1675, 60 L.Ed.2d 156 (1979), *rev'g Petrol Stops Northwest* v. *United States*, 571 F.2d 1127, 1129-31 (9th Cir. 1978); *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682-83, 78 S.Ct. 983, 986-987, 2 L.Ed.2d 1077 (1958). Although determination of whether such a need exists is left initially to the discretion of the trial judge, *U.S. Industries*, 345 F.2d at 21, the factors guiding that determination are well established. A court must examine not only the need of the party seeking disclosure, but also the effect such disclosure would have on the policies underlying grand jury secrecy. In *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958), the Supreme Court set out those policies:

> "(1) [t]o prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from expense of standing trial where there was no probability of guilt."

Id. at 681, n.6, 78 S.Ct. at 986 n.6 (quoting *United States* v. *Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)).

The district court in ordering disclosure failed to consider these principles. Near the conclusion of the hearing on the Rule 6(e) motion, the trial judge stated that [*sic*] rationale for its order:

> I think where you have an attorney with the Civil Division of the Department of Justice, as long as he made a showing that he has a legitimate interest in the disclosure and that he has a need of, so-called particularized need, then I think it should and could be turned over to him.
>
> . . . .
>
> Now, I think that the government has shown a particularized need here. They have demonstrated that the grand jury materials are rationally related to civil matters within the duty of the attorney for the government and that he

> requires the assistance of non-lawyers described and it may be those non-lawyers will be Defense Department people, but I don't think this court is required to, nor is it going to look beyond what the statute provides, or what the rule provides. If the Civil Division has the authority to prosecute violations of False Claim Acts and there have been indications that these may have occurred—the Department of Justice Civil Division attorneys have the ability and the right to determine and assist in whether or not such violations did occur.

The United States, like any litigant, has a legitimate interest in obtaining disclosure of materials that may help it to vindicate its rights through civil proceedings. A legitimate interest, however, is not necessarily compelling. The need for disclosure must be balanced against the policies of secrecy articulated in *Procter & Gamble*. *See Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 223, 99 S.Ct. 1667, 1675, 60 L.Ed.2d 156 (1979). Because the criminal proceedings have terminated, the first three of those factors are not implicated. However, the fourth factor—encouragement of witness cooperation—may be strongly implicated here. The final factor also militates toward preserving secrecy, since at least one target, Sells, Inc., obtained dismissal of all criminal charges against it.

The showing of a rational relationship between the materials and the civil proceeding may explain the Government's desire for disclosure, but it does not help determine the degree of necessity. That determination is made by evaluating the policies of secrecy in light of the character of the materials. In doing so, the district court must examine each dis-

tinguishable type of protected material and determine for each whether the need for disclosure outweighs the traditional and fundamental presumption of secrecy. Any grand jury abuse that has occurred is relevant to the district court's decision whether to disclose, and the court should consider appellants' allegations of such abuse. *See Robert Hawthorne, Inc.* v. *Director of Internal Revenue*, 406 F.Supp. 1098, 1118 (E.D.Pa. 1975 amended 1976); *see also In re December 1974 Term Grand Jury Investigation*, 449 F.Supp. 743, 750-51 (D.Md.1978); S.Rep. No. 95-354, 95th Cong., 1st Sess. 8 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 527, 532 ("On the contrary, there is no reason why such use [of grand jury-developed evidence for civil law enforcement purposes] is improper, assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation.").

The legislative history to the 1977 amendment of Rule 6(e) states that "the judicial hearing in connection with an application for a court order by the government under subparagraph (3)(C)(i) should be *ex parte* so as to preserve, to the maximum extent possible, grand jury secrecy." S.Rep. No. 95-354, 95th Cong., 1st Sess. 8 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 527, 532. Much of the material to which the government seeks access consists of documents belonging to appellants. In these circumstances, the district court should hear appellants' views on disclosure of these documents, since such a hearing will in no way impair grand jury secrecy. It may also be appropriate for the district court to hear appellants' views on disclosure of documents with which they are familiar but do not own. We leave it for the district court to determine in the first

instance, with reference to the policies underlying grand jury secrecy, whether adversary hearings should be held regarding other materials to which the government seeks access.

The order of the district court granting disclosure is vacated and the cause remanded for further proceedings consistent with this opinion. Pending these further proceedings, the district court shall take such steps as are, in its discretion, necessary to protect the appellants from the effects of past disclosure. To avoid continued or further improper disclosure, the mandate in this case shall issue forthwith. *See* Fed.R.App. P. 2. A petition for rehearing and a suggestion of rehearing en banc will be entertained in the ordinary fashion. *See* Fed.R.App.P. 35(b), 40.

CURTIS, District Judge, dissenting:

I dissent for, in my view, the issue which the appeal raises here is moot.

This is an appeal from an order of the district court made December 18, 1978, releasing grand jury records from the secrecy provision of Title 18, U.S.C.A. § 3326 (1977), Fed.R.Crim.P. 6(e). Since the effect of the order was never stayed, Civil Division attorneys for the Justice Department have had full access to all the minutes, books, and records of the grand jury's criminal investigation of these appellants. Even if we should hold that the district court erroneously permitted such disclosure, our reversal cannot restore any vestige of secrecy, any more than we can unring a bell. It seems unrealistic to suggest that, after more than two years of unrestricted use of the material by government attorneys and their staff, any shred of relevant information remains unexplored to which this now tattered veil of secrecy might give shelter.

Moreover, the appellants have a remedy more direct than this appeal. Since the record indicates that the government has commenced a civil suit against them, one in which such grand jury records will most surely be offered as evidence, appellants can at that time challenge all such evidence by objections to its admissibility, or by a motion to suppress. The district court, having the benefit of a full record before it, can then resolve any remaining questions regarding the government's use of these grand jury materials.

Having concluded that the issue is moot due to the subsequent disclosure of grand jury materials, it follows that this court lacks subject-matter jurisdiction because no viable "case or controversy" is presented to us. *U.S. Const.*, art. III, § 2, cl. 1. *North Carolina* v *Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971); *Powell* v. *McCormack*, 395 U.S. 486, 496 n.7, 89 S.Ct. 1944, 1950 n.7, 23 L.Ed.2d 491 (1969).

I would dismiss the appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-3709
DC No. G/J 78-184-G

IN RE GRAND JURY INVESTIGATION NO. 78-184
SELLS, INC., PETER A. SELLS, FRED R. WITTE,
APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the Southern District of California

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the order of the said District Court in this Cause be, and hereby is vacated and remanded for further proceedings.

Filed and entered April 2, 1981.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CA No. 78-3709

DC No. G/J 78-184-GT

IN RE GRAND JURY INVESTIGATION NO. 78-184
SELLS, INC., PETER A. SELLS, FRED R. WITTE,
APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Filed Aug. 6, 1981

Before: FARRIS AND NELSON, Circuit Judges, CURTIS,* District Judge.

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Farris and Judge Nelson have voted to reject the suggestion for rehearing en banc and Judge Curtis would so recommend.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Honorable Jesse W. Curtis, Senior United States District Judge for the Central District of California, sitting by designation.

APPENDIX D

DISTRICT COURT'S ORAL OPINION OF DEC. 18, 1978 (Tr. 79-82)

* * * * *

THE COURT: Well, I've considered the matter, this release of the grand jury proceedings, and I was prepared to rule on those motions even before they were withdrawn, and I see no reason to change my opinion now.

First of all, I'm convinced that the section 6(e)(II)(A)(1) [*sic*], that the Office of the Attorney General is an attorney for the government for use in the performance of such attorney's duty—no question, but what the attorney general is an attorney for the government, and that's within the rule—I think it's 54(c). So I think clearly it comes within the 6(e)(2) [*sic*] exception, and that the grand jury proceedings and the grand jury materials can be turned over to any attorney for the government for the use in the performance of the attorney's duty here.

First of all, that was squarely upheld, as far as we are concerned, by the case of *In re Grand Jury*, 583 Fed. 2nd, Fifth Circuit, 1978. The cases cited by the defendants in this case apply to such disclosure as to IRS attorneys, which, of course, are not affected and not to attorneys of the Civil Division of the Department of Justice, and I think where you have an attorney with the Civil Division of the Department of Justice, as long as he has made a showing that he has a legitimate interest in the disclosure and that he has a need of, so-called particularized need, then I think it should and could be turned over to him.

The case cited, *Capital Indemnity* case, cited by the defense, was a case unlike our situation because in that case we had a grand jury that was still in session and still proceeding in that matter.

Now, I think that the government has shown a particularized need here. They have demonstrated that the grand jury materials are rationally related to civil matters within the duty of the attorney for the government and that he requires the assistance of non-lawyers described and it may be those non-lawyers will be Defense Department people, but I don't think this court is required to, nor is it going to look beyond what the statute provides, or what the rule provides. If the civil division has the authority to prosecute violations of false claim acts and there have been indications that these may have occurred—the Department of Justice civil division attorneys have the ability and the right to determine and assist in whether or not such violations did occur.

They have also alleged, while it may or may not be a legitimate allegation, that they want to look to see if there's been or will be a running of the statute of limitations. I'm not nearly as concerned with that, although that, too, has been upheld *In re Grand Jury Subpoenas*, 581 Fed. 2nd, 1103 at 1110, and that's a Fourth Circuit case, 1978.

Defendants in this case cite the *Simplot* case. Of course, that decision was vacated as moot, and the court disapproved its interpretation of rule 6(c) [*sic*]. I think the basis for its ruling was at that point extremely restricted. I think that we have the issue of whether or not there is a judicial proceeding to which this order would be preliminary, and that's again following the Fifth Circuit, which I think is good law, held a judicial proceeding included a con-

templated governmental civil prosecution. The government in this case contemplates civil prosecution.

I think that the government has made the proper showing on at least one ground, and perhaps two grounds, and I think that they are entitled to those grand jury transcripts.

I might say in passing, I don't know what the effect of the withdrawal of the motions had or would have on the ability of Mr. Witte's counsel and Mr. Sells' counsel to argue to the court that there was abuse of the process of the grand jury. While I need not reach the issue and do not do so, I'll comment in passing that had I been faced with a determination of that ruling, I would have ruled there was no abuse of the grand jury process, and I'm not going to elucidate the reasons for the ruling because I'm not called on to make them. What effect that may have on this proceeding, I know not. So that pretty well indicates this court's determination.

* * * * *

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Grand Jury No. 78-184

IN RE GRAND JURY INVESTIGATION

ORDER PERMITTING DISCLOSURE OF GRAND JURY MATERIALS PURSUANT TO RULE 6(e), FEDERAL RULES OF CRIMINAL PROCEDURE

Upon consideration of the motion of the United States for an order pursuant to Rule 6(e), Federal Rules of Criminal Procedure, it is this 18th day of December, 1978,

ORDERED that the motion of the United States be and the same hereby is granted, and it is

FURTHER ORDERED that pursuant to Rule 6(e), Federal Rules of Criminal Procedure, all documents and exhibits presented to and transcripts of proceedings before the federal grand jury in the following criminal case:

> United States v. Peter A. Sells, Fred R. Witte, Robert E. Tucker, and Richard H. Teerlink, Criminal Case No. 780279;

and any subsequent cases or proceedings related thereto, be disclosed to attorneys for the Civil Division of the Department of Justice, their paralegal

and secretarial staff, and such other persons as are necessary to assist said attorneys in the performance of their duties.

/s/ Gordon Thompson, Jr.
United States District Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 350500 708

Supplemental Brief

Office - Supreme Court, U.S.
FILED
APR 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1032

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

SELLS ENGINEERING, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1032

UNITED STATES OF AMERICA, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This supplemental memorandum is submitted in response to the Court's invitation to address the question of mootness. As we explain below, although the government argued in the court of appeals that this case became moot following disclosure of the grand jury materials to Civil Division attorneys, we are persuaded that the court of appeals rejected that contention on grounds that are essentially sound, and that this case continues to present a live controversy that may properly be decided by this Court.

1. As noted in the petition (Pet. 8 n.5), in the court of appeals, before the panel, the government argued that respondents' appeal from the district court's order authorizing disclosure of grand jury materials to government attorneys and support personnel had been rendered moot by implementation of that order during the period while the appeal was pending, after a stay had been decided. See Brief for Appellee (the United States) at 8-11, *In re Grand Jury*

Investigation No. 78-184, 642 F. 2d 1184 (9th Cir. 1981). The government argued (Br. 9; emphasis in original):

> If [respondents] complain of the United States' *access* to grand jury materials, their complaint is moot; if appellants complain of the United States' *use* of grand jury materials, their complaint is premature.[1]

The court of appeals, however, rejected the government's mootness argument (Pet. App. 6a-7a), explaining:

> The controversy here is still a live one. By its terms the disclosure order grants access to all attorneys for the Civil Division, their paralegal and secretarial staff, and all other necessary assistants. Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the continued access of those to whom the materials have already been disclosed. We cannot restore the secrecy that has already been lost but we can grant partial relief by preventing future disclosure.[2]

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[1] In support of the latter proposition the government cited cases from several courts of appeals suggesting generally that a remedy for improper grand jury procedure, if not the only remedy, would be available upon an appropriate motion in any civil action subsequently commenced in which the government sought to make use of the materials disclosed. See, *e.g.*, *In re April 1977 Grand Jury Subpoenas (General Motors)*, 584 F. 2d 1366, 1370 (6th Cir. 1978) (en banc) (grand jury abuse); *In re Grand Jury*, 583 F. 2d 128, 131 (5th Cir. 1981) (grand jury abuse); *In re Grand Jury Subpoenas, April 1978 at Baltimore*, 581 F. 2d 1103, 1110 n.16 (4th Cir. 1978), cert. denied, 440 U.S. 971 (1979) (unauthorized disclosure); *Witte* v. *United States*, 544 F. 2d 1026, 1029 (9th Cir. 1976).

[2] Reversing upon the merits, the court of appeals directed the district court to "take such steps as are, in its discretion, necessary to protect the [respondents] from the effects of past disclosure" (Pet. App. 18a), and specified that "[t]o avoid continued or further improper disclosure" (*ibid.*) the court's mandate would be issued immediately.

Judge Curtis, sitting by designation, dissented, stating that he would dismiss the appeal as moot (*id.* at 18a):

> [O]ur reversal cannot restore any vestige of secrecy, any more than we can unring a bell. It seems unrealistic to suggest that, after more than two years of unrestricted use of the material by government attorneys and their staff, any shred of relevant information remains unexplored to which this now tattered veil of secrecy might give shelter.

Following the court of appeals' decision, after careful study of the mootness question, the Solicitor General determined that the government would seek rehearing (with a suggestion for en banc consideration) only on the merits in this case and that the mootness contention would not be pressed. See Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc, No. 78-3709 (9th Cir., filed May 19, 1981).[3] This decision was reconsidered following the court of appeals' denial of rehearing. For the reasons stated below, we again concluded that, although the question is a close one, the case was not moot and accordingly that no mootness argument should be included in the petition for a writ of certiorari.

2. a. The decision of the court of appeals is, so far as we are aware, the only authority directly bearing on the question of mootness in this setting.[4] There is a line of authority,

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[3]In the rehearing petition the government argued the two questions presented by our petition in this Court, together with the question noted at page 21 n.12 of the petition.

[4]A panel of the Fifth Circuit has noted in dictum that an appeal from a grand jury disclosure order "may be moot once the material has been disclosed." *In re Grand Jury*, 583 F. 2d 128, 129 (1978). This tentative suggestion was made only to explain the panel's relatively careful attention to the merits in disposing of a motion to stay a disclosure order. As is noted in the petition (Pet. 11, 19), the Fifth Circuit's

however, concerning an analogous situation. With the possible exception of the Third Circuit,[5] the courts of appeals have uniformly held that an appeal from a district court order enforcing an administrative summons issued by the Internal Revenue Service pursuant to Section 7602 of the Internal Revenue Code of 1954 is rendered moot by compliance with the summons.[6] In the summons enforcement cases the courts of appeals have generally reasoned that, after compliance, the "particular controversy that is the subject matter of * * * appeal—the enforceability of the summons[] * * * no longer exists," *United States* v. *Kis*, 658 F. 2d 526, 533 (7th Cir. 1981). The courts have also rejected the suggestion that the controversy is not moot following production because the court of appeals could, should it reverse, require return of the documents produced and bar the use of such documents in any future proceeding, noting the well-established rule that the suppression issue is not ripe until the government actually seeks to introduce the documents in evidence. *Ibid.*, citing, *inter alia, Donaldson* v. *United States*, 400 U.S. 517, 531 (1971); *United States* v.

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decision in *In re Grand Jury, supra*, conflicts with the decision below on the issues that are raised by the petition. See also *In re Corrugated Container Grand Jury*, 659 F. 2d 1330 (5th Cir. 1981), cert. denied, No. 81-1583 (Apr. 19, 1982), which is discussed at page 10, note 18, *infra*.

[5]See *United States* v. *Friedman*, 532 F. 2d 928, 931 (1976); but cf. *Vesco* v. *SEC*, 462 F. 2d 1350 (1972).

[6]See, *e.g.*, *United States* v. *Kis*, 658 F. 2d 526, 532-535 & n.10 (7th Cir. 1981) (collecting cases); *United States* v. *Trails End Motel, Inc.*, 657 F. 2d 1169 (10th Cir. 1981); *United States* v. *Equity Farmers Elevator*, 652 F. 2d 752 (8th Cir. 1981); *United States* v. *Silva and Silva Accountancy Corp.*, 641 F. 2d 710 (9th Cir. 1981); *United States* v. *First American Bank*, 649 F. 2d 288 (5th Cir. 1981); *United States* v. *Aquinas College Credit Union*, 635 F. 2d 887 (6th Cir. 1980), cert. denied *sub nom. Schwallier* v. *United States*, 450 U.S. 1042 (1981); *United States* v. *Arthur Andersen & Co.*, 623 F. 2d 720 (1st Cir. 1980); *United States* v. *Deak-Perera International Banking Corp.*, 610 F. 2d 89 (2d Cir. 1979); *Kurshan* v. *Riley*, 484 F. 2d 952 (4th Cir. 1973).

Blue, 384 U.S. 251 (1966). We entertain no doubts as to the soundness of the IRS summons decisions.

The general outlines of the mootness question in the setting of this case and that in the summons enforcement cases are plainly similar. Indeed, the argument made by the government in the court of appeals (see page 2, *supra*) replicates the analysis employed in the IRS summons cases.[7] There are, however, several differences between the enforcement of an IRS summons and the issuance of an order authorizing disclosure of grand jury materials under Rule 6(e)(3)(C)(i) (or recognizing authority to disclose under Rule 6(e)(3)(A)(i)) of the Federal Rules of Criminal Procedure.

First, in the grand jury setting, unless a court authorizes disclosure, or disclosure is authorized under Rule 6(e)(3)(A), there is simply no authority to disclose grand jury material. Secrecy is the norm imposed by the law. Fed. R. Crim. P. 6(e)(2). Thus, absent authority under Rule 6(e)(3) for disclosure, no government attorney or support staff member may receive disclosure of grand jury material; indeed, such disclosure is prohibited in the public interest. See *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218-219 (1979). By contrast, pursuant to 26 U.S.C. 7602, the issuance of an administrative summons imposes an obligation to respond upon the recipient. Although the recipient may, without suffering any sanction, test the Service's entitlement to receive the documents by resisting the summons and provoking an enforcement proceeding, the fact remains that the obligation to deliver documents comes into being prior to, and independently of, the district court's order of enforcement. And there is no legal impediment to voluntary compliance with the summons at any time, for the public

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[7] The government's brief in the court of appeals, however, did not cite the IRS summons cases.

interest in collection of taxes that are due favors production.[8] There is no public interest in secrecy comparable to that in the grand jury disclosure context.

Thus, when the summonee complies with an IRS summons, there is no longer any remaining case or controversy as to the only issue in the enforcement proceeding—whether or not the summons must be honored.[9] Nor is there any remaining public policy interest to be protected by adjudication of the merits. But when grand jury materials are disclosed subsequent to their surrender to the grand jury, neither the subject of investigation nor the original custodian or owner from whom the materials were obtained has in any way honored an assertion of authority to disclose grand jury documents.[10] Accordingly, it may fairly be argued that the controversy between the government and respondents retains vitality.[11]

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[8]Special rules are prescribed by statute for third-party summonses. See 26 U.S.C. 7609.

[9]Indeed, it is not possible to ascertain in any meaningful sense whether the summonee has honored the summons or complied with the enforcement order. In either event, the summonee has given the Service everything it sought and no meaningful relief could be afforded on appeal.

[10]Thus, unlike in most IRS summons enforcement cases, the opponent of disclosure of grand jury materials cannot go into contempt to secure appellate review. See *United States* v. *Kis, supra*, 658 F. 2d at 533-534. Indeed, as noted in the petition (page 21 n.12), Congress contemplated that application for a disclosure order under Rule 6(e) would be made *ex parte*.

[11]By contrast, and by analogy to the IRS summons enforcement cases, we suppose that if the government attorneys acquired the materials sought from a source independent of the grand jury, without any violation of grand jury secrecy—as, for instance, if respondents had voluntarily produced the documents sought while this case was pending on appeal—a stronger argument could be made that this case is moot.

A second, related, distinction between summons enforcement orders and disclosure of grand jury materials pursuant to Rule 6(e)(3) may support a distinction between the vitality of the two kinds of cases as a consequence of government access. The issue in a summons enforcement proceeding under Section 7604 of the Internal Revenue Code is whether, under Section 7602 or any other applicable law, the Service is entitled to *access* to documents and records relevant to tax assessment (26 U.S.C. 7602(1)) or whether the summonee must *produce* the document in question (26 U.S.C. 7602(2)). On the other hand, the issue under Rule 6(e)(3)(A)(i) and in any hearing on a motion for disclosure under Rule 6(e)(3)(C)(i) is whether *disclosure* should be made to a particular individual or individuals. Thus, while, as the courts of appeals have recognized, the Internal Revenue Service has everything it sought whenever a summons is complied with, and the court lacks the power meaningfully to restore the *status quo ante*, there is an extra dimension to the interest protected by Rule 6(e) that does not evaporate entirely upon the physical transfer of grand jury materials to persons covered by Rule 6(e)(3)(A)(i) or by a disclosure order under Rule 6(e)(3)(C)(i).[12] It therefore is plausible to conclude, as did the court of appeals, that each additional increment of disclosure implicates the protection of Rule 6(e) to some degree, and that the parties have "a legally cognizable interest in the outcome" of an appeal challenging such future disclosures. *United States Parole Commission* v. *Geraghty*, 445 U.S. 388, 396 (1980).

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[12]Unlike Rule 6(e), which is framed in terms of disclosure to particular individuals, Section 7602 of the Internal Revenue Code speaks of production to the Secretary of the Treasury. Thus, the statute clearly contemplates that production be regarded as made to the Internal Revenue Service as a whole and the effect of an enforcement order is, accordingly, spent when production is first made. The Court has previously recognized that, in the administration of the tax laws, the Service is to be regarded as an unitary entity. See *United States* v. *LaSalle National Bank*, 437 U.S. 298, 307-311 (1978).

Nor is this distinction an arid technicality, for it mirrors a difference between the statutory policies applicable to these two areas. As explained above, public policy favors enforcement of IRS summonses: the only countervailing interests recognized are essentially private ones pertaining to individual rights and privacy. See 26 U.S.C. 7609.[13] On the other hand, the public policy embodied in Rule 6(e) ordinarily favors secrecy for reasons that include, but are not limited to, the privacy interests of the subject of investigation. See *Douglas Oil Co.* v. *Petrol Stops Northwest, supra*, 441 U.S. at 218-222 & n.8; *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 681 n.6 (1958), quoting *United States* v. *Rose*, 215 F. 2d 617, 628-629 (3d Cir. 1954). In light of the special character of the public interest in grand jury secrecy, it might frustrate the policy of Rule 6(e) to hold that respondents' appeal from the district court's disclosure order became moot upon implementation of that order.[14]

b. In rejecting the claim of mootness, the court of appeals reasoned essentially that, because Rule 6(e) is a rule of secrecy prescribing limited exceptions for disclosure to particular individuals pursuant to court order or the terms of the Rule, the government avails itself of that disclosure authority whenever disclosure is made to additional individuals or additional disclosure is made to persons already

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[13]Thus, the IRS is barred by statute from public dissemination of information pertaining to taxpayers. See 26 U.S.C. 6103.

[14]A rule that implementation of a disclosure order moots any appellate challenge thereto would presumably apply to all disclosure requests, not merely to government requests. Of course, for the reasons set forth in the petition, we submit that disclosure to government attorneys is explicitly authorized by Rule 6(e)(3)(A)(i) and that, under a proper standard, disclosure to necessary support personnel was likewise properly authorized pursuant to Rule 6(e)(3)(C)(i), because the public interest in the limited disclosure sought by the government outweighed any residual interest in continued absolute secrecy. Our submission here is simply that respondents were entitled to test our contentions by their appeal even after disclosure commenced.

privy to grand jury materials. On this analysis, which we have enlarged upon above, continuing government retention of materials disclosed pursuant to Rule 6(e) implicates the policy of the Rule in a manner that has no analogue in the summons enforcement context, where the sole legal issue is whether the summons is to be enforced, thereby compelling production of the document in issue. To be sure, the residual interest in maintaining grand jury secrecy against further disclosures to government personnel is considerably less than that affecting other disclosures of grand jury materials. As the court of appeals concluded, however, it is not necessarily *de minimis*. Cf. *Douglas Oil Co.* v. *Petrol Stops Northwest, supra*, 441 U.S. at 222 & n.13.[15]

The interests protected by the court of appeals' resolution of the mootness issue in this case are neither abstract nor hypothetical. We are informed that one of the two government attorneys primarily responsible for development of the civil fraud action against respondents has left government employment since filing of the complaint. When proceedings resume in that case, it will be necessary to assign one or more new government attorneys to the case.[16] Although it is impossible now to predict what role grand jury material may play in the civil fraud case, the government cannot represent that a new attorney will not have occasion to become familiar with these materials, thereby availing himself of the authority conferred by the district

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[15]In *Douglas Oil*, the Court applied a relatively strict standard for determining whether grand jury materials should be released to a private party for use in connection with civil litigation, even though, in the setting of the case, the public interest in grand jury secrecy was considerably diminished.

[16]Proceedings in the civil case have been effectively suspended pending disposition of this case.

court's order.[17] The same is true of support personnel; additional individuals may well have occasion to receive disclosure of grand jury materials in the preparation of the government's civil fraud case. Moreover, we are informed that government attorneys have not finished reviewing all of the materials disclosed pursuant to the district court's order. It is therefore reasonably clear that continued government access to grand jury materials does entail additional and continuing disclosure subject to Rule 6(e). If the court of appeals' judgment were to be affirmed on the merits, the resulting judgment would not be a nullity but would almost certainly have an effect upon the ensuing civil proceedings.[18]

In sum, if this case involved an IRS administrative summons, production of the requested material during the pendency of the summons enforcement proceeding unquestionably would have mooted the case. We believe, however, that in the slightly different context of disclosure of grand jury materials and in the particular factual setting of this case, the court of appeals correctly concluded that its ability

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[17]It is less clear to us that, as the court of appeals stated (Pet. App. 6a-7a), continuing access to grand jury materials by persons already privy to them implicates the policy of Rule 6(e) in any substantial fashion.

[18]This case is therefore distinguishable from *In re Corrugated Container Grand Jury*, 659 F. 2d 1330 (5th Cir. 1981), cert. denied, No. 81-1583 (Apr. 19, 1982), in which the court of appeals held that the appeals from an order directing disclosure of grand jury materials to a private civil antitrust plaintiff had become moot. There, the court of appeals' decision rested upon the fact that the disclosure order identified with particularity the persons to whom disclosure could be made and the uses they might make of the materials, and the fact that all such uses had been completed. 659 F. 2d at 1331-1332. Stressing the highly fact-bound nature of its determination (*id.* at 1331), the court of appeals concluded (*id.* at 1332): "Because there is no further use to which these transcripts may be put under the order of the district court, these appeals are moot."

to "grant partial relief by preventing further disclosure" (Pet. App. 7a) is sufficient to rescue the case from mootness.

3. For the foregoing reasons, and the reasons stated in our petition and reply brief, the petition for a writ of certiorari should be granted. If, contrary to our submission, the Court concludes that the disclosure of the grand jury materials renders the case moot, the judgment of the court of appeals should be vacated and the case remanded with directions to dismiss. *Murphy* v. *Hunt*, No. 80-2165 (Mar. 2, 1982), slip op. 6.

Respectfully submitted.

REX E. LEE
Solicitor General

APRIL 1982

DOJ-1982-04

Joint Appendix

Office-Supreme Ct.
FILED
AUG 6 1982
ALEXANDER L. STEVAS,

No. 81-1032

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

SELLS ENGINEERING, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED DECEMBER 2, 1981
CERTIORARI GRANTED MAY 3, 1982

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1032

UNITED STATES OF AMERICA, PETITIONER

v.

SELLS ENGINEERING, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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[1] These affidavits were previously filed as attachments to Witte's Consolidated Motions to Dismiss the Criminal cases, filed Nov. 13, 1978.

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(The opinion (Pet. App. 1a-19a), judgment (*id.* at 20a), and order denying rehearing en banc (*id.* at 21a) of the court of appeals, and the district court's Order Permitting Disclosure of Grand Jury Materials (*id.* at 25a-26a) are printed as appendices to the petition for a writ of certiorari.)

Relevant District Court Docket Entries[1]

G.J. No. 78-184

1	Affidavit of Robert E. Curtis	12/7/78
2	Affidavit of Warren P. Reese	12/7/78
3	Affidavit of Jerry J. Strayer	12/7/78
4	U.S. Memorandum in Support of Its Motion for an Order Permitting Disclosure of Grand Jury Materials Pursuant to Rule 6(e), Fed. Rules Crim. Proc.	12/8/78
5	Opposition to Govt.'s Motion to Permit Disclosure of Grand Jury Materials Pursuant to Rule 6(e) and Supplement to Motions previously filed re Rule 6(e)	12/12/78
6	Minutes of Court (re: Hrg. on govt.'s motion)	12/15/78
7	Minutes of Court (re: Hrg. on govt.'s motion)	12/18/78
8	Order Permitting Disclosure of Grand Jury Materials Pursuant to Rule 6(e), Fed. Rules Crim. Proc.	12/20/78
9	Order Granting Interim Stay of Dist. Court's Order	1/2/79

[1] These entries are reproduced from a log maintained by the grand jury clerk for the United States District Court for the Southern District of California. They are not maintained upon a formal docket sheet such as is used for civil and criminal actions, apparently because the application for an order under Rule 6(e), Fed.R.Civ.P. is treated as a miscellaneous grand jury related matter. We are advised that the log reproduced is the only official record of filings. We nonetheless have reason to believe that the log is not entirely complete.

10	Notice of Appeal from an Order of a Dist. Court	1/15/79

* * * * *

22	Order (re: vacating Dist. Court order and remand)	4/20/81
23	Opinion (of Court of Appeals)	4/2/81

Attachments To Witte's Consolidated Motions To Dismiss Indictments Etc.[2]

1. Section 9267.4 Of The Internal Revenue Service Manual (Feb. 22, 1977)

9267.4 (2-22-77)

"Open-ended" Grand Jury Proceedings

(1) Occasionally, investigations into areas of noncompliance are stymied by a series of reluctant witnesses, and it is not possible to determine the precise limits of the tax violations in terms of defendants and taxable periods. If such investigations become stymied, and it appears that an open-ended grand jury inquiry would probably develop information which would result in prosecution recommendation(s), the special agent should submit a complete report to the Chief containing:

(a) a statement of the investigation to date;

(b) an outline of the proposed criminal case(s) that may be developed;

(c) a list of the witnesses, together with the documents they should produce, that should be subpoenaed;

(d) an outline of the questions that should be propounded to the witnesses;

(e) an evaluation of the potential effect of the case(s) on an area of noncompliance.

(2) The report will be forwarded to the ARC (Intelligence) upon the concurrence of the Chief, Intelligence Division and the District Director.

(3) If the ARC (Intelligence) concurs, the repor. will be forwarded to Regional Counsel.

(4) Regional Counsel will telephonically coordinate the case with the Criminal Tax Division. If Regional Coun-

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[2] Originally filed on Nov. 13, 1978, in *United States* v. *Sells et al.*, Cr. No. 78-0279-GT (S.D. Calif.) and *United States* v. *Witte*, Cr. No. 78-0280-GT (S.D. Calif.).

sel agrees with the recommendation, a detailed criminal reference letter will be prepared and forwarded to the Tax Division of the Department of Justice.

(5) If the Tax Division concurs in the request, it will authorize the United States Attorney(s) to institute grand jury proceedings.

(6) Following the appearance of witnesses before the grand jury, the procedures of IRM 9268 will be followed.

(7) The United States Attorney of the Strike Force Attorney will be advised that jurisdiction of the tax aspects remains with the Internal Revenue Service and the Tax Division, Department of Justice and that prosecutive recommendations under Title 26 will be processed in the regular manner.

2. Internal Revenue Service Manual Supplement (July 29, 1977)

Manual Supplement 29,717

Department of the Treasury
Internal Revenue Service
9G-61
42G-368
45G-286

July 29, 1977

Grand Jury Provisions

Section 1. Purpose

The purpose of this Supplement is to incorporate the text of three telegrams concerning Grand Jury provisions.

Section 2. Text of November 24, 1976, Telegram Addressed to All Regional Commissioners, All District Directors, All Regional Counsels, and All Branch Offices to Regional Counsel, from the Directors of Criminal Tax Division, the Audit Division, and the Intelligence Division

.01 "Effective immediately the provisions of IRM 9267.1, 9267.2, 9268, and 7(14)2:(2) of IRM 4235, Techniques Handbook for In-Depth Audit Investigations are suspended. Detailed procedures will be issued shortly.

.02 "The propriety of Service procedures relative to the Grand Jury are currently under direct attack in a United States District Court. In that case the court requested an amicus curiae brief of the Service discussing its relationship to Grand Juries in the course of tax investigations. Discussions were then held between the Department of Justice and the Internal Revenue Service as a first step in the resolution of this matter. The Department of Justice voiced the position that the uncooperative witness procedure and the debriefing procedure were not sustainable. They concluded that the uncooperative witness procedure is improper in that control of the investiga-

tion does not remain within the authority of the Grand Jury. They further concluded that the debriefing procedure under IRM 9268 is improper in that it may be construed to be a device used to improperly obtain Grand Jury material for civil purposes.

.03 "As a result of this discussion, an oral agreement was reached between the Department of Justice and the Internal Revenue Service that: (1) the debriefing procedure set forth in IRM 9268 will no longer be used; and (2) once a tax investigation is referred to the Department of Justice for Grand Jury investigation, the investigation thereafter will remain under the Grand Jury.

.04 "Separate Manual provisions are being prepared regarding court orders for civil purposes under Rule 6(e), Federal Rules of Criminal Procedures. In view of the instant suspension of IRM 9268, the Chief should seek the advice of Regional Counsel with respect to the seeking of such court orders pending release of separate Manual provisions in that respect."

Section 3. Text of April 11, 1977 Telegram Addressed to All Regional Commissioners, All District Directors, All Regional Counsels, All Branch Offices of Regional Counsel, and the Director of International Operations, from the Acting Commissioner

.01 "If the Audit Division has an examination in process at the time a Grand Jury investigation starts, either as part of a joint investigation with the Intelligence Division or as an independent examination, the Audit Division will maintain control of the original tax returns as well as have responsibility for the solicitation of civil consents. This applies to those years under investigation by the Grand Jury and any other years Audit may have under investigation.

.02 "However, in the absence of a Rule 6(e) Order which permits civil use of Grand Jury evidence, the Audit Division may not use Grand Jury information for any purpose. Thus, in those cases above, absent a Rule 6(e) Order, consents may only be solicited based on information obtained independent of the Grand Jury's investigation.

.03 "The fact that Grand Jury information is known to Intelligence or Audit Division agents who are assisting the Grand Jury investigation is not an automatic bar to solicitation of consents or an examination of a return if information obtained independent of the Grand Jury exists which would justify the solicitation of a consent or the examination of a particular return. If the individual or corporate returns would be eligible for selection because of high DIF [Discriminant Function] scores, or the returns meet the selection criteria of the coordinated examination program, or information obtained independent of the Grand Jury indicates that underpayment of tax could exist, then consents could be solicited or an examination conducted by a revenue agent other than the one assisting the Grand Jury. In such cases the Audit Division will maintain control of the original tax returns.

.04 "In those cases where there has not been any involvement by the Audit Division prior to the start of the Grand Jury's investigation, and the criteria as stated in the preceding paragraph has not been met to permit solicitation of consents or the examination of a return and a Rule 6(e) Order has not been obtained, the Intelligence Division will maintain control of the tax returns. This will hold true even if a revenue agent is assigned to provide technical assistance. In such cases, neither the Audit nor the Intelligence Divisions will be responsible for the civil statutes to those years under investigation by the Grand Jury.

.05 "If, however, there exists any information from a source other than the Grand Jury investigation, the Chief, Intelligence and/or Chief, Audit will be responsible for evaluating the impact of the expiration of the statute of limitations. This evaluation must be sufficiently in advance of that expiration to accommodate the actions necessary to permit a timely assessment of a deficiency. Under no circumstances, however, will the Chief, Intelligence, impart any Grand Jury information to Audit personnel including the Chief, Audit."

Section 4. Text of June 2, 1977 Telegram to All Regional Commissioners, All Regional Counsels, and the Director of International Operations, from the Assistant Commissioner (Compliance)

.01 "The Service is conducting a comprehensive review of the relationship of the Service and Federal Grand Juries. Until revised guidelines can be finalized, the following interim guidelines will apply in the instances of Service assistance to a Grand Jury investigating possible violations of Internal Revenue Laws and related statutes.

.02 "1. Information disclosed to or developed by agents (whether special agents or revenue agents or managers) while assisting an attorney for the Government in connection with a Grand Jury generally (unless particular circumstances dictate otherwise) constitutes Grand Jury information governed by the secrecy provisions of Rule 6(e). Grand Jury information is available only to those persons assisting the United States Attorney. As such, it generally may be used or disclosed by such agents only in rendering such assistance. Grand Jury information may not be used for civil purposes without a Federal Rules of Criminal Procedure Rule 6(e) Order which specifically authorizes the use of such information for civil purposes.

.03 "2. Service employees assisting the attorney for the Government will not use the administrative summons (Form 2039).

.04 "3. Service procedures relative to district conferences in IRM 9356 will not apply.

.05 "4. Service procedures relative to giving subjects Miranda-type warnings in IRM 9384 do not apply.

.06 "5. To prevent doubt about the origins of information available for civil use, information in the possession of the Service prior to the receipt by Service personnel of any Grand Jury information must be identified by preparing a comprehensive record, with appropriate indexes and descriptions, of such information as of the moment preceding such receipt. Thereafter, any related information obtained by the Service totally apart from Grand Jury information should similarly be rec-

orded and its independent source specified. Should it become necessary to make a civil assessment or to solicit consents after the initiation of the Grand Jury investigation, only non-Grand Jury information may be used in the absence of a Federal Rules of Criminal Proecedure Rule 6(e) Order which authorizes the use of Grand Jury information for civil purposes. (See teletype from Acting Commissioner William E. Williams dated April 11, 1977.)

.07 "6. Revenue agents may be assigned to assist an attorney for the Government in connection with Grand Jury investigations, but in that capacity, have no civil function. If the revenue agent prepares a report for the attorney for the Government, such report will be submitted to the Chief, Intelligence Division. To the extent that a technical review is desirable, it will be undertaken by a reviewer designated by the Chief, Audit Division.

.08 "7. While acting as assistants to the attorney for the Government, Service personnel may use their official Service credentials for identification purposes only; and when exhibiting their credentials, they must indicate that they are acting as such assistants.

.09 "8. While acting as assistants to the attorney for the Government, neither special agents nor revenue agents may solicit or seek information for other than criminal purposes.

.10 "9. Appropriate background information should be obtained for the attorney for the Government. Normally, such information could be obtained by the agents assigned to the Grand Jury. However, if any information is to be obtained by a collateral request, the attorney for the Government or his-[/her] representative should make a written request to the appropriate Chief, Intelligence Division, for the information. Any disclosure of information governed by IRC Section 6103 may be disclosed only as authorized by that section. Service procedures relative to the Centralized Evaluation and Processing of Information items are modified to include only taxpayer identification information (Form 3949, Items 1-16) and will not include Grand Jury information."

Section 5. Effect on Other Documents

.01 This obsoletes IRM 9267.2 and 7(14)2:(2) of IRM 4235, Techniques Handbook for In-Depth Audit Investigations.

.02 This amends IRM 9267.1, 9268, 9311.3, 9356, 9360, 9384, 4530, 4540, and 4565.

/s/ Thomas J. Clancy
Director
Intelligence Division
(6-15-77)

Excerpts And Attachments From Government's Opposition To Defendants' Pre-Trial Motions [3]

1. Memorandum Of Points And Authorities

a. Page 22, lines 9-32

3. *Presentation to the Grand Jury*

(Responding to Witte's Memorandum, pages 15-29 and Sells' Memorandum, pages 18-26)

a. *Approach to Presentation*

Government counsel's review of the investigative report concerning the grand jury investigation prepared by Agent Wordell inclined him to the view that a criminal prosecution should be initiated. This view was reinforced by examination of various documents obtained through the investigation and pertinent portions of testimony and affidavits of various witnesses.

In late 1977, IRS Regional Counsel was requested to reveiw the evidence collected for the purpose of making recommendations to the Tax Division of the Department of Justice concerning the feasibility of criminal prosecution. The Office of Regional Counsel was neither requested nor expected to review the evidence adduced through the grand jury or the field investigations for any purpose other than to determine whether criminal violations had been committed.

The grand jury originally utilized in the investigation expired in November 1977. It could not have been asked to return indictments in view of the status of the case at the time.

b. Page 24, lines 3-32

During this period of time government counsel conferred with a representative of the Defense Contract Audit Agency

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[3] Originally filed on Nov. 28, 1978, in *United States* v. *Sells et al.*, Cr. No. 78-0279-GT (S.D. Calif.), and *United States* v. *Witte*, Cr. No. 78-0280-GT (S.D. Calif.).

concerning audits conducted by that agency to identify those pieces of evidence which had significance in the audits for, and negotiation of certain contracts between the Naval Air Systems Command and Sells Engineering, Inc.

After outlining the preliminary drafts of the conspiracy counts of the proposed indictments, they were furnished to Agent Wordell who was instructed to identify and mobilize testimonial and documentary evidence acquired in the investigation which supported the allegations in the drafts. This evidence was reviewed with Mr. Wordell along with other evidence considered pertinent and an approach was formulated by government counsel for questioning Mr. Wordell, Mr. Rogers and Mr. Wojdowski (an auditor with the Defense Contract Audit Agency) in the course of the grand jury presentation. All evidence to the grand jury was introduced in response to government counsel's questions and the questions of the grand jurors. Government counsel supervised the presentation.

By letter dated March 29, 1978, addressed to the United States Attorney, the Assistant Attorney General in charge of the Tax Division recommended prosecution of Fred Witte. This recommendation relates to Criminal Case No. 78-0280, consolidated for the purposes of these motions. Completed drafts of both indictments were prepared to round out the framework for presentation to the grand jury.

Evidence was presented to the grand jury on March 28, April 4, 6 and 13, 1978, and on the latter dates Indictments Nos. 78-0270 and 78-0280 were returned.

2. Affidavit Of Special Agent Edwin H. Wordell, Dated November 28, 1978

a. Page 13, lines 13-25

Request For Grand Jury Investigation

40. As of April 1976, I had information which indicated that conspiracies had been formed to defraud the United States by over-charging for military procurement and by willfully attempting to evade corporate and individual income taxes.

41. Therefore, on [sic] April 1976, I prepared a request for open-ended grand jury proceedings in accordance with Internal Revenue Service Manual Section 9267.4. A copy of this manual section is attached as Exhibit H to this affidavit.

42. I submitted the request to the District Director of Internal Revenue for the attention of the Chief of the Intelligence Division.

b. Page 15

49. On November 2, 1976, Assistant U.S. Attorney Thomas Coffin gave me a letter confirming his previous instructions to me as an agent for the grand jury. A copy of this letter is attached as Exhibit I.

50. I have adhered to these instructions and I have not disclosed any material obtained from the grand jury to the Internal Revenue Service for use in determining civil tax liability.

51. I have not discussed the issues of these cases or investigative findings with anyone other than authorized persons. These individuals are identified below:

Assistant U.S. Attorney Thomas M. Coffin

Assistant U.S. Attorney Warren P. Reese

Internal Revenue Agent Mark F. Rogers

Internal Revenue Agent Charles H. Breese

Internal Revenue Service Group Manager James Nielsen

Internal Revenue Service Regional Counsel Attorneys: Lee Kamp, David Fuller, Martin Klotz

Internal Revenue Service Technical Advisor Vernon Lynch

Internal Revenue Service Chief, Intelligence Divison Ronald Saranow

Internal Revenue Service Computer Specialist/Special Agent Gloria Hall

52. The following individuals performed specific tasks related to the grand jury investigation. Case issues or informa-

tion developed in the course of the grand jury investigation were not disclosed to these individuals except as necessary for their specific tasks, which are outlined below:

Internal Revenue Service Criminal Investigation Division Secretary Jane Frayser typed my investigative report.

Internal Revenue Service Criminal Investigation Division Tax Fraud Investigative Aides David Duran and Ramon Chavez assisted in sorting, filing and copying voluminous records.

3. Affidavit Of David P. Fuller, Dated November 22, 1978

Criminal Case #78-0279

UNITED STATES OF AMERICA,

Plaintiff,

v.

PETER A. SELLS, FRED R. WITTE,
ROBERT E. TUCKER and RICHARD H. TEERLINK,

Defendants.

CONSOLIDATED WITH

Criminal Case #78-0280

UNITED STATES OF AMERICA,

Plaintiff,

v.

FRED R. WITTE,

Defendant.

I David P. Fuller, depose and state that I am an attorney employed by the Office of Chief Counsel, Internal Revenue Service. My post of duty is in the District Counsel's Office in Los Angeles, CA.

In the latter part of September, 1977, I was assigned to review certain evidence obtained by the United States Attorney's Office in San Diego, California. This evidence was secured by means of a Grand Jury investigation into the business affairs of various individuals, and corporations, performing defense contract work for the United States Navy.

Pursuant to an agreement between the Department of Justice and the Office of Chief Counsel, it was my task to analyze the grand jury material for evidence of criminal tax violations, and to make recommendations with respect to tax and tax-related prosecutions. My work involved the review of a Special

Agent's Report, as well as voluminous business documents. My on-site review in San Diego occurred during the months of November and December, 1977.

Thereafter, I returned to Los Angeles to organize my findings and reduce them to written form. In February and March of 1978, I sent two evaluation reports to the Department of Justice recommending that the above-captioned individuals be prosecuted for various tax and tax-related criminal violations. The completion of these letters marked the end of my active involvement in the case. Throughout the course of my work on this case, my exclusive and sole purpose was to evaluate the criminal potential of the grand jury material. I made no civil tax use of these materials, and I have made no unauthorized disclosures to persons in a position to make such use of them.

The foregoing statement, which I have read, fully understand, and signed is true, accurate and complete to the best of my knowledge and belief.

David P. Fuller
DAVID P. FULLER, Affiant
Attorney
Office of District Counsel
Los Angeles, California

Subscribed and Sworn to before me
this 22nd day of November, 1978
at Los Angeles, California.

V. Eileen Haid
V. EILEEN HAID

4. Affidavit Of Vernon E. Lynch, Dated November 22, 1978

Criminal Case #78-0279

UNITED STATES OF AMERICA,

Plaintiff,

v.

PETER A. SELLS, FRED R. WITTE,
ROBERT E. TUCKER and RICHARD H. TEERLINK,

Defendants.

CONSOLIDATED WITH

Criminal Case #78-0280

UNITED STATES OF AMERICA,

Plaintiff,

v.

FRED R. WITTE,

Defendant.

I, Vernon E. Lynch, depose and state that as the Technical Advisor in the Office of Regional Counsel for the Internal Revenue Service, Los Angeles, California, I was assigned to assist Regional Counsel Attorney David Fuller in the review of the Special Agent's Report with Exhibits plus Grand Jury material relating to the above-captioned individuals. My assignment commenced on or about October the 28th, 1977 and continued until March the 14th, 1978. The purpose of our review was to determine if there was adequate evidence to forward the subject cases to the Department of Justice with a recommendation that the principals be indicted on Federal income tax-related charges.

Following our determination that there was an adequate basis to forward these cases, I prepared computations of tax-

able income and income tax deficiencies plus summaries for indictments for forwarding to the Department of Justice with the criminal reference letter prepared by Regional Counsel Attorney David Fuller. My efforts in these matters were limited to processing the subject cases for criminal purposes only as I am assigned full time to the Criminal Tax function in the office of Regional Counsel.

The foregoing statement, which I have read, fully understand, and signed is true, accurate and complete to the best of my knowledge and belief.

Vernon E. Lynch
VERNON E. LYNCH, Affiant
Technical Advisor
Office of District Counsel
Los Angeles, California

Subscribed and Sworn to before me
this 22nd day of November, 1978
at Los Angeles, California.

V. Eileen Haid
V. EILEEN HAID

5. Affidavit Of Lee A. Kamp, Dated November 22, 1978

Criminal Case #78-0279

UNITED STATES OF AMERICA,

Plaintiff,

v.

PETER A. SELLS, FRED R. WITTE,
ROBERT E. TUCKER and RICHARD H. TEERLINK,

Defendants.

CONSOLIDATED WITH

Criminal Case #78-0280

UNITED STATES OF AMERICA,

Plaintiff,

v.

FRED R. WITTE,

Defendant.

I, Lee A. Kamp, depose and state that I am an attorney and Assistant District Counsel in the District Counsel's Office, Los Angeles, California.

That during 1976 I was requested by the Intelligence Division (now Criminal Investigation Division) to evaluate the need for an openended grand jury with respect to the abovenamed individuals and corporations. On June 24, 1976, this office recommended an openended grand jury and the Department of Justice approved our request on August 2, 1976. Up to this point, the material examined by this office was non grand jury material.

On January 1, 1977, I was appointed Staff Assistant in charge of the Criminal Tax function and I assigned attorneys

from our office to aid and assist the attorney for the government in evaluating the Grand Jury materials. Initially I assigned Martin F. Klotz, senior attorney, to review any grand jury materials, and subsequently David Fuller, attorney, and Vernon Lynch, technical advisor, were also assigned to evaluate these materials. In October 1977, an investigative grand jury report was forwarded by Special Agent Wordell to our office for evaluation of the evidence. Since the exhibits were contained in three file cabinets, an on-site review of the exhibits were performed by Attorney Fuller and Technical Advisor Lynch in San Diego during November and December, 1977. On February 6, 1978, David Fuller, with the technical assistance of Vernon Lynch and the secretarial assistance of Marie A. Zuniga and Lena Fleischer, forwarded an evaluation report for the aforementioned individuals and corporations to the United States Deprtment of Justice, Attention: Joe Groff. Further evaluation was necessary with respect to the transactions involving Fred Witte. An additional evaluation report was completed by David Fuller and forwarded to the Department of Justice on or about March 20, 1978. Since March 20, 1978, a copy of the investigative grand jury report and a copy of our evaluation reports have been segregated and kept in a locked cabinet with no other personnel of Counsel's office or Internal Revenue Service having access to these materials.

During 1976 and 1977, it was the policy of Chief Counsel's Office to restrict assignment of Counsel personnel to the absolute minimum number necessary to complete the task. On October 28, 1977, a proposed draft of Treasury policy position entitled, "Proposed Grand Jury Order" was disseminated to Chief Counsel field attorneys. This Order describes the relationship of Counsel and Internal Revenue Service to the Federal Grand Jury and established procedures for carrying out that relationship. On page 17 of the proposed draft are guidelines on restricting the number of Counsel personnel to assist in the evaluation of grand jury cases. Attached hereto and incorporated herein is a copy of the proposed draft of the aforementioned policy position.

The foregoing statement, which I have read, fully understand, and signed is true, accurate and complete to the best of my knowledge and belief.

Lee A. Kamp
LEE A. KAMP, Affiant
Asst. District Counsel
Office of District Counsel
Los Angeles, California

Subscribed and Sworn to before me
this 22nd day of November, 1978
at Los Angeles, California.

V. Eileen Haid
V. EILEEN HAID

Attachments To Witte's Reply To Government's Opposition To Defendant's Pre-Trial Motions [4]

1. Affidavit Of Arthur Kimball, Dated August 10, 1978 [5]

AFFIDAVIT

STATE OF CALIFORNIA,)
) ss.
COUNTY OF SAN DIEGO.)

ARTHUR KIMBALL, being first duly sworn on oath deposes and says:

1. I am a citizen of the United States and a resident of San Diego County, California.

2. During the month of October, 1976, I was served with a United States subpoena to testify before the Federal Grand Jury by a Deputy United States Marshal. My appearance was ordered for October 14, 1976, with orders to produce certain records pertaining to transactions I might have had with the Sells Engineering Company, Inc. which records were ordered to be produced by me for the use of the Federal Grand Jury at San Diego, California.

3. Sometime prior to the date for my ordered appearance before the United States Grand Jury at San Diego, California, either I or my attorney, Fred G. Cunard, received a telephone call from Special Agent Edwin Wordell directing that I appear before him in a room that he designated in the Federal Building at San Diego, instead of before the Federal Grand Jury.

4. During the month of October, 1976, I did appear before Special Agent Edwin Wordell with my attorney Fred Cunard

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[4] Originally filed on December 5, 1978, in *United States* v. *Sells et al.*, Cr. No. 78-0279-GT (S.D. Calif.), and *United States* v. *Witte*, Cr. No. 78-0280-GT (S.D. Calif.).

[5] This affidavit and the affidavits of Ernest Crawford, Lou W. Woody, Louis A. Sanchez, Gary Clemesha, John S. DiMaggio, and Gail Barr were previously filed as attachments to Witte's Consolidated Motions in the criminal cases on Nov. 13, 1978.

at which place and time Assistant U.S. Attorney, Thomas Coffin, was also present.

5. I can recall that during my interrogation by Special Agent Wordell and Assistant U.S. Attorney Coffin I was asked about a $6,700 check which they apparently believed I had given to Peter Sells.

6. I stated that I could not remember such a check, to which both Assistant U.S. Attorney Tom Coffin and Special Agent Wordell stated that they believed that I was lying. I told both of them if they wanted me to testify about things I did not know about they should tell me what to say and I would say them. I was then asked to take a polygraph test to be administered by a private operator that they would designate, which I finally agreed to do with the understanding that I would be reimbursed for the expense of this test, which reimbursement I never received.

7. I believe I was served with a second subpoena in September, 1977. In response to this second subpoena ordering me to appear and testify before the United States Grand Jury, I again appeared before Special Agent Edwin Wordell, at which time I was informed by them that I had "flunked" the polygraph test and would not be granted immunity for my testimony that they wanted. Mr. Coffin and Mr. Wordell then told me that I was lying and was trying to protect people to which I replied that in fact if this is the way you fellows operate, just make up a statement as to what you want me to sign and I will sign it. I can recall that Mr. Coffin left the room, at which time Special Agent Wordell told me that I had better cooperate with Coffin because, if I did not, he could really make things rough for me. After Assistant U.S. Attorney Coffin returned to the room and as the interview was terminating, I started to walk towards the door, at which time Special Agent Wordell turned to Assistant U.S. Attorney Tom Coffin and said, "shall we let him go" to which Tom Coffin then said, "yes let him go." At this time, I turned to Special Agent Edwin Wordell and said, "what do you mean let me go, I am not under arrest" to which Special Agent Wordell said, "he doesn't have

to let you go unless he wants to" inferring that I could be detained there forcibly by these persons.

8. Although I was served with two federal subpoenas ordering me to appear and testify before the United States Grand Jury, in each instance, I was required to appear and submit to interrogations by Special Agent Edwin Wendell and Assistant U.S. Attorney Tom Coffin being present a portion of the time on these occasions.

I have carefully read these statements in the affidavit set forth in Paragraphs 1 to 8, and do hereby state that they are true to the best of my knowledge, information, and belief.

Arthur Kimball
ARTHUR KIMBALL

Subscribed and sworn to before me
this 10th day of August, 1978.

Patricia L. Johnson
PATRICIA L. JOHNSON
Notary Public in and for said
County and State

2. Affidavit Of Ernest F. Crawford, Dated August 2, 1978

AFFIDAVIT

STATE OF CALIFORNIA,)
) ss.
COUNTY OF SAN DIEGO.)

ERNEST F. CRAWFORD, being first duly sworn on oath deposes and says:

1. I am a citizen of the United States and a resident of San Diego County, California.

2. I have been both a personal and business associate of Mr. Fred Witte during the past approximate 15 years and have had business associations with companies with which he has been connected.

3. During the latter part of 1976, I was served with a Federal Grand Jury subpoena by a Deputy United States Marshal ordering me to appear and testify before the United States Grand Jury.

4. Sometime prior to the date on which I was ordered to appear and testify before the Grand Jury at San Diego, either I or my attorney, Fred G. Cunard, was advised by Special Agent Edwin Wordell that I was to appear and testify before Mr. Wordell rather than appearing to testify before the United States Grand Jury as ordered by the federal subpoena.

5. On the date ordered by Special Agent Edwin Wordell, I did appear at the room designated by Mr. Wordell in the Federal Building with my attorney, Fred Cunard, and was questioned by Special Agent Wordell and Assistant United States Attorney Thomas Coffin concerning numerous documents relating to business transactions between myself, Sells Engineering, Inc., Center Glass Company No. 3, Robert Tucker, Peter Sells, and Fred R. Witte.

6. I do not have a vivid recollection of the interrogation at this time but do recall that Messrs. Wordell and Coffin, in numerous instances, were attempting to elicit my testimony that transactions between myself and Peter Sells and Robert Tucker were known to Fred R. Witte which in most instances I replied to the contrary.

7. After two or three additional sessions with Special Agent Wordell, at which times he continued his questioning of me on similar matters, I was requested by Wordell to appear at this same room in the Federal Building for the purpose of reading and signing an affidavit which he had prepared for my signature, which I did.

8. The affidavit that I signed at the request of Special Agent Wordell did not contain my statements of the non-participation by Fred Witte in numerous of the transactions about which I was questioned by Special Agent Wordell.

9. Although I was ordered to testify before the United States Grand Jury by having been served with the above-mentioned United States Grand Jury subpoena, I was never requested or permitted to appear and testify before the Grand Jury.

I have carefully read these statements in this affidavit, Paragraphs 1 to 9, and do hereby state that they are true to the best of my knowledge, information and belief.

Ernest F. Crawford
ENEST F. CRAWFORD

Subscribed and sworn to before me
this 2nd day of August, 1978.

Michelle Bailey
MICHELLE BAILEY
Notary Public in and for said
County and State

3. Affidavit Of Lou W. Woody, Dated August 4, 1978

AFFIDAVIT

STATE OF MISSOURI,)
) ss.
COUNTY OF DADE.)

LOU W. WOODY, being first duly sworn on oath deposes and says:

1. I am a citizen of the United States and a resident of Golden City, Missouri.

2. During the approximate period from August 1963 to January 1975, I was employed as a secretary and general office helper for Center Glass Company No. 3 in San Diego County, California.

3. Sometime during the early part of May 1977, I received a telephone call at my home in Golden City, Missouri, from Special Agent Edwin Wordell of the United States Treasury Department who told me that a subpoena had been issued by the U.S. Attorney's office requiring my appearance before the United States Grand Jury at San Diego, California, on May 11, 1977. He then asked me if I would be agreeable to flying out to Los Angeles prior to my having been served with the Grand Jury subpoena with the understanding that I would be served with such subpoena after my arrival in San Diego. I asked him what choice I had to which he replied, none, other than that I could insist upon being served with the United States Grand Jury subpoena prior to the time that I departed from my home in Missouri. I finally agreed to travel to San Diego prior to having been served with the United States Grand Jury subpoena with the understanding that I would accept such service when I arrived in San Diego.

4. I arrived in San Diego on or about May 9, 1977, and went to the Federal Building at San Diego on the morning of May 11, 1977, at which place and time I was served with a subpoena, dated May 2, 1977, by Special Agent Edwin Wordell, ordering

me to testify before the Federal Grand Jury at San Diego, California, 9:00 A.M. on May 11, 1977.

5. Prior to my having gone to the Federal Building on the morning of May 11, I was advised by telephone by Special Agent Wordell that I would not be appearing before the Federal Grand Jury but would be interrogated by him instead, at which time he gave me the number of a room in the Federal Building at which I was to meet him on the morning of May 11, 1977.

6. On the morning of May 11, 1977, I went to this room with my attorney, Mr. James Miller, at which place I was met by Special Agent Edwin Wordell and Internal Revenue Agent Mark Rogers.

7. During the morning of May 11, 1977, I was questioned principally by Special Agent Wordell about numerous documents and asked to identify handwriting on various documents which were shown to me by Special Agent Wordell without a court reporter being present.

8. On the afternoon of May 11, and during the full day of May 12, 1977, I was interrogated by Special Agent Edwin Wordell in the presence of Internal Revenue Agent Mark Rogers and my attorney, James Miller, with a court reporter being present to record the proceedings on the afternoon of May 11 and the full day of May 12.

9. I can recall that at some time after the conclusion of these proceedings, I was requested and did sign some sort of a paper for Special Agent. I do not now recall the nature of this paper and do not believe I received a copy of it.

10. I was never given an opportunity to appear before the Grand Jury in response to the Grand Jury subpoena served on me but instead ordered by Special Agent Wordell to submit to questioning by him as described above.

I have carefully read these statement in the affidavit set forth in Paragraphs 1 to 10, and do hereby state that they are true to the best of my knowledge, information and belief.

Lou W. Woody
LOU W. WOODY

Subscribed and sworn to before me
this 4th day of August, 1978.

Charles P. Furman???
CHARLES P. FURMAN
Notary Public in and for said
County and State

4. Affidavit Of Louis A. Sanchez, Dated July 18, 1978

AFFIDAVIT

STATE OF CALIFORNIA,)
) ss.
COUNTY OF SAN DIEGO.)

LOUIS A. SANCHEZ, being first duly sworn on oath deposes and says:

1. I am a citizen of the United States and a resident of San Diego County, California.

2. I have been employed by and associated with Fred Witte and companies with which he has been associated since the approximate year of 1962.

3. During this period of time, I have been employed mostly as a salesman.

4. Sometime during the month of April, 1977, a Deputy United States Marshal served me with a subpoena ordering that I appear before the United States Grand Jury on April 27, 1977.

5. As ordered by this subpoena I, accompanied by my attorney Mr. James Miller, went to the office of the United States Attorney at which place and time we were directed to a room in which Special Agent Edwin Wordell and another man were present. Also present was a person who appeared to be a court reporter who recorded the questions mostly propounded by Special Agent Wordell and my answers to those questions.

6. At the beginning of the interrogation, Special Agent Wordell told me that he was investigating the Center Glass Company and others for possible income tax fraud and he then swore me in in the presence of the court reporter and the other persons present.

7. The interrogation by Special Agent Wordell lasted from approximately 9:30 A.M. to 11:45 P.M. during which time he asked me numerous questions about whether I knew anything

about expenses charged to credit cards, how the expenses of the Mexican trip were handled on the books and records, whether I knew numerous persons that he mentioned to me, and whether or not I actually gave some money to my sister which had been returned to me, for my sister representing an investment she had made in a company known as the Sells Engineering Company.

8. During the course of this interrogation, I told Special Agent Wordell that I was unable to provide any testimony concerning how these matters were charged on the bookkeeping records; and that he was wrong if he believed that the money that had been returned to me, representing my sister's investment in the Sells Engineering Company, went to anyone else but to her.

9. Three or four months later, I was again ordered to appear before Mr. Wordell in the same room in the Federal Building at San Diego, California. I again went there with my attorney, Mr. James Miller, and was asked substantially the same questions on this occasion. It is my recollection that there was a court reporter present on this occasion also. During this second meeting, resulting from my having been served with a Federal Grand Jury subpoena, I was asked to read the transcript of the questions and answers occurring during the first interrogation by Special Agent Wordell. It is my recollection that I signed a copy of this transcript of the questions and answers relating to the first meeting; and that a copy was given to my attorney. I cannot recall whether or not I ever saw or received a copy of the transcript of the interrogation by Special Agent Edwin Wordell during the course of my second appearance ordered by him.

10. At no time was I offered an opportunity to appear before the Federal Grand Jury in response to the Federal Grand Jury subpoena served upon me during the month of April, 1977.

I have carefully read the contents of this affidavit as set forth in Paragraphs 1 to 10, and do hereby state that the statements are true to the best of my information, knowledge, and belief.

Louis A. Sanchez
LOUIS A. SANCHEZ

Subscribed and sworn to before me
this 18th day of July, 1978.

Michelle Bailey
MICHELLE BAILEY
Notary Public in for said
County and State

5. Affidavit Of Gary W. Clemesha, Dated July 18, 1978

AFFIDAVIT

STATE OF CALIFORNIA,)
) ss.
COUNTY OF SAN DIEGO.)

GARY W. CLEMESHA, being first duly sworn on oath deposes and says:

1. I am a citizen of the United States and a resident of San Diego County, California.

2. I have been close personal and business associate of Mr. Fred Witte during the approximate past eight year period.

3. Sometime during the Summer of 1977, I was served with a federal subpoena by a Deputy U.S. Marshal directing me to appear and testify before the United States Grand Jury the exact date of which I do not now recall.

4. Sometime prior to my ordered appearance before the United States Grand Jury, I received a telephone call from Special Agent Edwin Wordell of the United States Treasury Department at which time he told me that instead of appearing before the grand jury I was to appear before him and be interrogated by him at a room in the Federal Building the number of which he gave me at that time.

5. Pursuant to his direction, I went to the room designated by him on the date ordered and was interrogated by him in the presence of an Internal Revenue Agent by the name of Mark Rogers.

6. I was later contacted by Special Agent Wordell at which time he told me that he had prepared an affidavit and asked me to sign it. I subsequently appeared at his office and did sign the affidavit as requested by him.

7. On the occasion at which I appeared before Mr. Wordell for the purpose of signing the affidavit, he was unhappy about the fact I could not recall where the lumber was used as described in Paragraph X of his affidavit, at which time I told him that I just could not remember where this lumber was used and he finally let me sign the affidavit as originally written.

5. Affidavit Of Gary W. Clemesha, Dated July 18, 1978

AFFIDAVIT

STATE OF CALIFORNIA,)
) ss.
COUNTY OF SAN DIEGO.)

GARY W. CLEMESHA, being first duly sworn on oath deposes and says:

1. I am a citizen of the United States and a resident of San Diego County, California.

2. I have been close personal and business associate of Mr. Fred Witte during the approximate past eight year period.

3. Sometime during the Summer of 1977, I was served with a federal subpoena by a Deputy U.S. Marshal directing me to appear and testify before the United States Grand Jury the exact date of which I do not now recall.

4. Sometime prior to my ordered appearance before the United States Grand Jury, I received a telephone call from Special Agent Edwin Wordell of the United States Treasury Department at which time he told me that instead of appearing before the grand jury I was to appear before him and be interrogated by him at a room in the Federal Building the number of which he gave me at that time.

5. Pursuant to his direction, I went to the room designated by him on the date ordered and was interrogated by him in the presence of an Internal Revenue Agent by the name of Mark Rogers.

6. I was later contacted by Special Agent Wordell at which time he told me that he had prepared an affidavit and asked me to sign it. I subsequently appeared at his office and did sign the affidavit as requested by him.

7. On the occasion at which I appeared before Mr. Wordell for the purpose of signing the affidavit, he was unhappy about this fact that I could not recall where the lumber was used as described in Paragraph X of his affidavit, at which time I told him that I just could not remember where this lumber was used and he finally let me sign the affidavit as originally written.

6. Affidavit Of John S. DiMaggio, Dated July 18, 1978

AFFIDAVIT

STATE OF CALIFORNIA,)
) ss.
COUNTY OF SAN DIEGO.)

JOHN S. DiMAGGIO, being first duly sworn on oath deposes and says:

1. I am a citizen of the United States and a resident of San Diego County, California.

2. I have been both a personal and business associate of Fred R. Witte during the past fourteen year period.

3. I was formally Vice President and currently President of the Center Glass Company.

4. Sometime during the month of August, 1976, I wa served with a Federal Grand Jury subpoena by a Deputy United States Marshal ordering my appearance before the Federal Grand Jury on August 27, 1976, and further ordering me to produce certain records listed on the subpoena, these records being the records of Center Glass Company No. 3.

5. In response to this subpoena, I did appear before the United States Grand Jury at San Diego, California, but did not produce the records because I did not feel that I was the proper custodian of these records and therefore did not have the authority to surrender them to the Federal Grand Jury. It was subsequently arranged by the United States Attorney that these records would be produced by Mr. Fred R. Witte who I felt was the proper custodian of these records.

6. Sometime during the month of April, 1977, I was served with another subpoena by a Deputy United States Marshal ordering that I appear before the Federal Grand Jury at San Diego, California on May 4, 1977.

7. Sometime prior to the date of my ordered appearance before the Federal Grand Jury on May 4, 1977, either I or my attorney, Mr. James Miller, received a telephone call from Special Agent Edwin Wordell of the United States Treasury Department directing that I appear before him at a designated

room in the Federal Building instead of appearing before the United States Grand Jury as ordered in the subpoena that was served upon me.

8. My attorney, James Miller, and I did appear at this room as ordered by Mr. Wordell and I was interrogated by him in the presence of Internal Revenue Agent Mark Rogers and my attorney, at which time the questions and answers were recorded by a court reporter. I recall that this interrogation lasted for approximately two hours and the questions mainly involved any transactions that I might have had with Center Glass Company and the Sells Engineering Company. I believe that I was ordered back to this room by Special Agent Wordell on one or two occasions after this appearance for the purpose of reading and discussing the transcript of the questions and answers resulting from the interrogation by Mr. Wordell on May 4, 1977.

9. I was never offered an opportunity to appear before the Federal Grand Jury in response to these subpoenas served on me by the Deputy United States Marshal in April, 1977.

10. During the course of the interrogation conducted by Special Agent Wordell, he repeatedly attempted to elicit my testimony that I was making "kick-backs" of money received by me to either Fred R. Witte personally or to the Center Glass Company to which I repeatedly told him that his allegations were not true.

I have carefully read the contents of this affidavit as set forth in Paragraphs 1 to 10, and do hereby state that the statements are true to the best of my information, knowledge, and belief.

John S. DiMaggio
JOHN S. DIMAGGIO

Subscribed and sworn to before me
this 18th day of July, 1978.

Michelle Bailey
MICHELLE BAILEY
Notary Public in and for said
County and State

7. Affidavit Of Gail Barr, Dated August 9, 1978

AFFIDAVIT

STATE OF CALIFORNIA,)
) ss.
COUNTY OF ORANGE.)

GAIL BARR, being first duly sworn on oath deposes and says:

1. I am a citizen of the United States and a resident of Orange County, California.

2. During the period from the Summer of 1971 to August 1973, I worked as a bookkeeper for the corporation known as Center Glass No. 3, working part time during the school terms and full during the summer vacation periods.

3. Sometime during the Spring of 1977, I was telephoned by a man who identified himself as Agent Wordell of the Treasury Department. He stated that I was subject to subpoena and requested my cooperation in the Department's investigation of Center Glass No. 3.

4. On the agreed date, he instructed me to come to a certain room in the Federal Building, advising me that his questioning of me would take a considerable period of time and because I did not wish to be away from my employment more than one day, we agreed to start the interrogation early on the day on which I was instructed to appear.

5. On the date of my appearance, I was questioned by Special Agent Wordell from early morning until late afternoon about a considerable number of documents, many of which were unfamiliar to me, but I provided him with what information I had concerning any documents about which I had any information or recollection.

6. I do not now recall the specific details of the interrogation of me by Special Agent Wordell but I do recall sometime after my appearance before him, I was presented with an affidavit that he asked me to sign, which I did. I asked not to receive a copy of this affidavit and have not received one.

I have carefully read the contents of this affidavit as set forth in Paragraphs 1 to 6 and hereby state that the statements are true to the best of my information, knowledge, and belief.

Gail Barr
GAIL BARR

Subscribed and sworn to before me
this 9th day of August, 1978.

Peter C. Yong
PETER C. YONG
Notary Public in and for said
County and State

Declaration Of E. Mac Amos, Jr., Dated December 11, 1978[6]

E. MAC AMOS, JR., ESQ.
AMOS & CURNOW
600 "B" Street, Suite 1550
San Diego, CA 92101
(714) 231-8051

Attorney for Defendant
PETER A. SELLS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Criminal Case No. 78-279-GT
DECLARATION OF E. MAC AMOS, JR.

UNITED STATES OF AMERICA,

Plaintiff,

v.

PETER A. SELLS, *et al.*,

Defendants.

I, E. MAC AMOS, JR., declare as follows:

1. I am the attorney for defendant, Peter A. Sells, in the above matter.

2. On Thursday, December 7th, and again on Friday, December 8th, I had occasion to speak with Assistant United States Attorney Warren Reese who is handling the prosecution of this case for the government. I inquired of Mr. Reese whether or not the government had obtained Rule 6(e) orders for the IRS personnel which had access to the grand jury materials and were in the process of preparing the govern-

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[6] Attached to Sells' Opposition to Government's Motion to Permit Disclosure of Grand Jury Materials etc.

ment's case. I was advised by Mr. Reese that the government had not obtained Rule 6(e) orders for these persons.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed this 11 day of December, 1978 at San Diego, California.

E. Mac Amos, Jr.
E. MAC AMOS, JR.
Attorney for Defendant SELLS

Affidavit Of A. R. Robbins, Dated December 12, 1978[7]

I, Arlington Ray Robbins, having been duly sworn, state:

1. I am co-counsel of record for Defendant Fred R. Witte.

2. In connection with the hearing before this Court on Thursday, December 7, 1978, concerning the Rule 6(e) motion brought by the United States, I first became aware of the possibility that the Government had failed to secure a Rule 6(e) order (under Fed.R.Crim.P. 6(e)) from this or any Court before allowing certain IRS personnel to assist the prosecutor and the Grand Jury in its investigation of Defendant's alleged criminal activities.

3. On Friday, December 8, 1978, I had a telephone conversation with Assistant United States Attorney Warren P. Reese, who is responsible for the prosecution of two criminal cases pending in the United States District Court entitled *United States* v. *Peter A. Sells, et al.*, Criminal Case No. 78-0279 and *United States* v. *Fred R. Witte*, Criminal Case No. 78-0280.

4. During this telephone conversation my suspicions were confirmed in that Mr. Reese stated that the Government had failed to secure a Rule 6(e) order prior to seeking the assistance of IRS personnel in connection with the Grand Jury investigation and presentation. I believe that this failure is a violation of the rule announced in *Hawthorne* v. *Director of Internal Revenue*, 406 F. Supp. 1098 (D.C. Penn 1976) and adopted by the Ninth Circuit in *In re Simplot* v. *U.S.*, 77-1 USCT § 9146 (9th Cir. 1976).

5. The points raised in this supplement are particularly germane to our motions in chief and should be considered in connection with those motions; and, it would be a more efficient

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[7] Attached to Witte's Supplemental Points and Authorities in Support of Defendant's Consolidated Motions to Dismiss Indictments and etc., filed on December 12, 1978, in *United States* v. *Sells et al.*, Cr. No. 78-0279-GT (S.D. Calif.).

use of the Court's time to consider this additional point added to Defendant's motion at the same time as those previously filed.

DATED: December 12, 1978

A. R. Robbins
A. R. ROBBINS

Subscribed and Sworn to before me
this 12th day of December, 1978.

Deanna Hauseur
DEANNA HAUSEUR

Reporter's Transcript Of Proceedings Of December 18, 1978, (Including Oral Opinion Of The District Court), Pages 77, Line 8—82 Line 8

MR. STRASSER [Government counsel]: Your Honor, I want to begin by noting our objection to even hearing from the defendants in this matter. I think the Senate report accompanying the amendment to Rule 6(e) makes it clear this kind of proceeding should be ex parte and we wouldn't have such long hearings if the defendants were not here.

As to the contentions the defendants raise, I think they have done their best to confuse what we're asking for. The papers we submitted for the hearing ten days ago, we asked for all the materials before the grand jury. We said our immediate need was to examine our own documents; however, we contemplated even at that time, and said so in our papers, we would want to look at everything. I think, furthermore, we are entitled under the terms of the rule to look at everything. The rule permits disclosures to attorneys for the government. I think any sensible review of 6(e) and 54(c) makes it clear Civil Division attorneys are attorneys for the government within the meaning of those rules. We're not seeking disclosures of the Defense Department—under the part of the rule permitting disclosure to attorneys for the government because Defense Department attorneys are not attorneys for the government. However, we have sought disclosure from them to assist us under another rule. And we submit that disclosure is made to Civil Division attorneys is only sensible to permit them to get the kind of assistance they need to examine the case.

As for the summons enforcement proceeding pending before Judge Turrentine, I don't see how any disclosure here will moot that issue. The issue there, whether to enforce IRS summonses—the defendants will be fully able to raise that issue before the judge and he will rule on it. If they want to raise grand jury abuse there as a defense, Judge Turrentine will consider it, but the issue is priority and the propriety of disclosure to Civil Division attorneys.

As for the allegations of grand jury abuse, I think that the exhibits attached to the Government's Opposition to the Mo-

tion to Dismiss filed in the preceding criminal case in this matter makes it clear those allegations are without basis. Furthermore, even if they had some basis, your Honor, the defendants have withdrawn them.

Your Honor asked counsel for Mr. Witte and counsel for Mr. Sells whether, in their opinion, there were any meritorious defenses to the indictment, to which their clients pled guilty on Friday, and both said no, there were not. I think, your Honor, that waives any objection they might have had on the ground of grand jury abuse.

That's all I have, your Honor.

The COURT: Well, I've considered the matter, this release of these grand jury proceedings, and I was prepared to rule on those motions even before they were withdrawn, and I see no reason to change my opinion now.

First of all, I'm convinced that the section 6(e)(II)(A)(1), that the Office of the Attorney General is an attorney for the government for use in the performance of such attorney's duty—no question but what the Attorney General is an attorney for the government, and that's within the rule—I think it's 54(c). So I think clearly it comes within the 6(e)(2) exception, and that the grand jury proceedings and the grand jury materials can be turned over to any attorney for the government for the use in the performane of the attorney's duty here.

First of all, that was squarely upheld, as far as we are concerned, by the case of *In re Grand Jury*, 583 Fed. 2nd, Fifth Circuit, 1978. The cases cited by the defendants in this case apply to such disclosure as to IRS attorneys, which, of course, are not affected and not to attorneys of the Civil Division of the Department of Justice, and I think where you have an attorney with the Civil Division of the Department of Justice, as long as he has made a showing that he has a legitimate interest in the disclosure and that he has a need of, so-called particularized need, then I think it should and could be turned over to him.

The case cited, *Capital Indemnity* case, cited by the defense, was a case unlike our situation because in that case we had a grand jury that was still in session and still proceeding in that matter.

Now, I think that the government has shown a particularized need here. They have demonstrated that the grand jury materials are rationally related to civil matters within the duty of the attorney for the government and that he requires the assistance of non-lawyers described and it may be those non-lawyers will be Defense Department people, but I don't think this court is required to, nor is it going to look beyond what the statute provides, or what the rule provides. If the Civil Division has the authority to prosecute violations of false claim acts and there have been indications that they may have occurred—the Department of Justice Civil Division attorneys have the ability and the right to determine and assist in whether or not such violations did occur.

They have also alleged, while it may or may not be a legitimate allegation, that they want to look to see if there's been or will be a running of the statute of limitations. I'm not nearly as concerned with that, although that, too, has been upheld in *In re Grand Jury Subpoenas*, 581 Fed. 2nd, 1103 at 1110, and that's a Fourth Circuit case, 1978.

Defendants in this case cite the *Simplot* case. Of course, that decision was vacated as moot, and the court disapproved its interpretation of Rule 6(c). I think the basis for its ruling was at that point extremely restricted. I think that we have the issue of whether or not there is a judicial proceeding to which this order would be preliminary, and that's again following the Fifth Circuit, which I think is good law, held a judicial proceeding included a contemplated governmental civil prosecution. The government in this case contemplates civil prosecution.

I think that the government has made the proper showing on at least one ground, and perhaps two grounds, and I think that they are entitled to those grand jury transcripts.

I might say in passing, I don't know what the effect of the withdrawal of the motions had or would have on the ability of Mr. Witte's counsel and Mr. Sell's counsel to argue to the court that there was abuse of the process of the grand jury. While I need not reach the issue and do not do so, I'll comment in passing that had I been faced with a determination of that ruling, I would have ruled there was no abuse of the grand jury

process, and I'm not going to elucidate the reasons for the ruling because I'm not called on to make them. What effect that may have on this proceeding, I know not. So that pretty well indicates this Court's determination.

I'd ask Mr. Strasser to draw an order not inconsistent with the statements made by the court.

Supreme Court of the United States

No. 81-1032

UNITED STATES,

Petitioner,

v.

SELLS ENGINEERING, INC., *et al.*

ORDER ALLOWING CERTIORARI. Filed May 3, 1982

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 378842 1045

Opposition

NO. 81-1032

Supreme Court, U.S.
FILED
MAR 31 1982
ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,
Petitioner,

v.

SELLS ENGINEERING, INC., et al.,
Respondents.

RESPONDENTS' BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1032

UNITED STATES OF AMERICA, PETITIONER

v.

SELLS ENGINEERING, INC., ET AL.

RESPONDENTS' BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

1. Approach Of This Response

This response will not restate what has already been said in the Petitioner's (hereinafter the "Government") petition except as to the extent that Respondents disagree or that may be necessary to put Respondents' points in focus. Respondents

do not dispute the importance of the issues raised by the Government's petition or the existence of the split of authority. The Respondents contend essentially that to grant certiorari at this time would be procedurally premature and that the issues raised by the Government are second level issues involving tests that should only be applied after a more fundamental question has been properly resolved in the courts below.

2. Procedural Status

The Government's Petition for a Writ of Certiorari has its nexus in an order granted under Rule 6(e) of the Federal Rules of Criminal Procedure (referred to herein as "Rule 6(e)") by the United States District Court for the Southern District of California, Judge Gordon J. Thompson, Jr., presiding. This order granted attorneys for the Civil Division of the Department of Justice (on behalf of

the Department of the Navy), their paralegal and secretarial staff, and other such persons as are necessary to assist said attorneys for civil litigation purposes, access to all documents and exhibits presented to and all transcripts of proceedings before the Federal Grand Jury in Criminal Case No. 78-0279, United States v. Peter A. Sells, Fred R. Witte, Robert E. Tucker, and Richard H. Teerlink. Said order was entered pursuant to a motion brought by the Government in a miscellaneous proceeding entitled in Re Grand Jury Investigation, Grand Jury No. 78-184. The Government seeks review by way of certiorari of a decision of the United States Court of Appeals for the Ninth Circuit (hereinafter the "Ninth Circuit") reversing the ruling of the district court and remanding the order for further proceedings and consideration. This decision is contained in "Appendix A" to

the Government's Petition for Writ of Certiorari. All direct references to this decision of the Ninth Circuit will be made to that appendix by page number of the appendix.

This case is directly interconnected with a very closely related case which is currently before the Ninth Circuit arising out of a Rule 6(e) order from the same judge, involving the same parties, involving the same Grand Jury No. 78-184, disclosing the same Grand Jury materials and documents, and involving one of the same issues the Government seeks review by this Court--only in that case, the Department of Justice is acting on behalf of the Internal Revenue Service. That closely connected case is filed as Case No. 80-5829 (hereinafter simply referred to as the "sister case") before the Ninth Circuit. It has been fully briefed and oral argument was heard on March 3, 1982.

For reasons which will be discussed below, Sells Engineering, Inc., Peter A. Sells, Fred R. Witte, Center Glass Co. No. 3 and B & W Partnership (hereinafter referred to as "Respondents") submit that consideration of the instant case by the Supreme Court, as sought by the Government at this time, should be held in abeyance until the sister case below has been decided by the Ninth Circuit. One of the major issues in that sister case is one of the same issues raised here on certiorari, the issue of "particularized and compelling need" under subsection 6(e)(3)(c)(i) of Rule 6(e). This sister case appeal has allowed the Government to reargue that issue again before a different panel of the Ninth Circuit and the matter now stands submitted.

Respondents' first contention in this Response is that for this Court to grant Certiorari before the Ninth Circuit has

completed its deliberations in what is essentially the same case would be premature.

3. Historical Background

On April 13, 1978, Respondents, Peter A. Sells and Fred R. Witte, among other individuals were indicted by a Federal Grand Jury in eleven counts, two counts of conspiracy to defraud the United States (18 U.S.C. 371) and nine counts of tax fraud under 26 U.S.C. 7206. On December 15, 1978, Respondents, Peter A. Sells and Fred R. Witte, entered guilty pleas to a single count of conspiracy to defraud the Internal Revenue Service.

Count one of the indictment charged Respondents and others with conspiracy to defraud the Department of the Navy in connection with the negotiation of contracts between the Naval Air Systems Command (hereinafter called the "Navy") and

Sells, Inc., for the production of electronic countermeasure devices. The plea bargain convictions which were procured as to Respondents, Peter A. Sells and Fred R. Witte, however, pertained only to count two, conspiracy to defraud the Internal Revenue Service. The Government dismissed all remaining counts in the indictment, including count one pertaining to conspiracy to defraud the Navy. It is as a result of this dismissed indictment that the Civil Division of the Justice Department sought the Rule 6(e) order on behalf of the Navy and that has ultimately resulted in the Government's petition to this Court.

Leading up to this indictment, the Internal Revenue Service in 1974 launched an administrative investigation assigning Special agent Edwin Wordell. In this capacity in January through July 11, 1975, Agent Wordell issued administrative

summonses directed to Respondents and others to produce corporate records of Respondent Sells, Inc., and other corporations and partnerships. The Respondents refused to comply on the grounds that these administrative summonses were being utilized in violation of Respondents' Fifth Amendment rights.

On July 29, 1975, Judge Turrentine, District Court Judge for the Southern District of California, denied a motion to suppress brought by Respondents and ordered the enforcement of six of the administrative summonses issued by Special Agent Wordell, calling for the production of records of Respondent Sells, Inc. On January 23, 1976, Judge Turrentine ordered production of the records of certain other entities, but dismissed enforcement of the summons calling for the production and testimony regarding certain partnership records. Stays were granted by Judge

Turrentine as to certain of the summonses for corporate records and appeals were instituted by these same Respondents to the Court of Appeals for the Ninth Circuit. All such appeals were consolidated for argument and hearing.

On October 13, 1978, the Ninth Circuit rendered its decision in the eight (8) docketed appeals. It remanded for further proceedings to the district court the orders enforcing summonses entered by Judge Turrentine. In its remand to Judge Turrentine concerning the administrative summonses, the Ninth Circuit stated:

> We feel that it is not appropriate for us to address these issues at this time, as it is clear from information properly coming into the record and recently made available to us that there are new facts which have arisen since the appeals were taken. At the time of oral argument it was disclosed to us, for the first time, that certain of the documents that are the subject of these appeals may be in the hands of the Grand Jury. Moreover, the recent amendment of

> Rule 6 of the Federal Rules of Criminal Procedure places restrictions on the use of that material only in criminal proceedings unless an order of Court is obtained. The new information as to Grand Jury possession of the documents and the new provisions of Rule 6 so alter the case as to these appeals that we deem it appropriate that the respective district courts should first have the opportunity to consider the issues and resolve them. United States v. Center Glass Co. No. 3, No. 75-3025 (9th Cir. Oct. 13, 1978, unpublished).

It was apparent from the questions asked from the Bench on oral argument combined with this statement of the court that the appeal panel was concerned with the Government's maneuvers after Judge Turrentine's order and stay, and that further consideration should be given to these subsequent developments by Judge Turrentine on remand. That earlier decision is referred to in the Ninth Circuit's opinion in this case at footnote 1 (page 2a, Petitioner's Appendix A) where the Ninth Circuit notes that no further

proceedings were held in the district court on this matter.[1/]

Because the Government was faced with appeals and a corresponding delay in the enforcement of the administrative summonses, Respondents believe and alleged below that Special Agent Wordell caused the initiation of an "open ended" Grand Jury investigation to expedite his administrative investigation and to effectively circumvent the stay orders regarding the administrative summonses of the district court and the appeals to the Ninth Circuit. It is one of Respondents' contentions that the Internal Revenue Service subverted the Federal Grand Jury to its administrative

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1/ It was one of Respondents major contentions before Judge Thompson in the instant case that the Government's Rule 6(e) motion should be transferred to Judge Turrentine for consideration in light of this history and earlier remand on the summonses and the Government's maneuvers involving the stays. This request was denied by Judge Thompson.

purposes to secure evidence for use in both criminal and civil proceedings.

Subsequent to entering guilty pleas in the criminal case to count two for conspiracy to defraud the Internal Revenue Service, the same district court at different times based on separate Government motions entered two separate 6(e) orders making a wholesale turnover of the entire Grand Jury proceeding transcripts and materials for use of the Civil and Tax Divisions of the Justice Department over strong objections of Respondents. It is these two orders that are the basis for the two appeals to the Ninth Circuit that are involved in this case and the sister case to which reference has been previously made.

4. Facts and Contentions Of This Case

The attorneys for the Civil Division in their motion filed with the District Court in this case, requested disclosure

pursuant to Rule 6(e) for the following reason:

> Attorneys for the Civil Division of the Department of Justice, in good faith and consistent with their statutory duties, are currently investigating the advisability of bringing a civil action against any or all of the defendants in the criminal case, for recovery of any monies which may be owed the Government as a result of defendants' actions, plus possible civil penalties under the False Claims Act, 31 U.S.C. 231, et seq. Materials either subpoenaed by the Grand Jury or developed during the course of the Grand Jury investigation are necessary to a determination of whether a civil suit should be brought and, if so, whether any potential claims may be precluded by statute of limitations problems, as the acts giving rise to the criminal case are alleged to have taken place in 1971, 1972 and 1973. There is cause for concern that any delay in the civil investigation may result in at least some potential claims being time-barred. Therefore, attorneys for the Civil Division respectfully move this Court for an Order pursuant to Rule 6(e), Fed. R. Crim. P., permitting disclosure of the Grand Jury materials.

The district court granted this motion on December 18, 1978, over the objections of Respondents that raised charges of Grand Jury abuse. Respondents urged that such charges were relevant to any release of Grand Jury materials to the Government for purely civil litigation purposes. Such charges were based upon a very comprehensive Grand Jury abuse motion initially filed in the criminal case supported by sworn declarations of eight Grand Jury witnesses. As the result of a plea bargain reached in the early procedural stages of the criminal case, which Respondents believe was precipitated principally by the thrust of this motion to avoid any hearing thereon, the motion became moot in the criminal case and was withdrawn for criminal use purposes. This motion was incorporated by reference, however, in Respondents' opposing papers in this case as a major ground for urging the district

court to deny a wholesale turnover of secret Grand Jury materials to the Government for strictly civil litigation purposes. The major thrust of the Grand Jury abuse motion was the dual purpose of the Internal Revenue Service in corrupting and directing the power of the Grand Jury for civil as well as criminal investigation and discovery purposes. Respondents contended in the district court, and on appeal that the Internal Revenue Service:

1. Resorted to an "open ended" Grand Jury procedure to conclude its civil administrative investigation when it found its summons power stayed by the Ninth Circuit (Footnotes #1 and 2 and related text, Ninth Circuit opinion, Government's Petition, Appendix A, pp. 2.a.-3.a.); and, had Grand Jury subpoenas issued identical to the administrative summonses which had been stayed.

2. Utilized at least five Internal Revenue Agents in the Grand Jury investigation without benefit of any Rule 6(e) order when such order was statutorily required before the 1977 amendment to Rule 6(e)--the same key IRS personnel that were conducting the earlier administrative investigation.

3. Improperly utilized the subpoena power of the Grand Jury to direct people to appear not before the Grand Jury but at the offices of the U. S. Attorney for the purpose of diverting those witnesses to private sworn and transcribed interrogation before Internal Revenue Service Special Agent Edwin Wordell and Agent Mark Rogers. These interrogations were held often outside the presence of the U. S. Attorney and occasionally with other persons and attorneys present. Little if any evidence was actually presented to this first Grand Jury.

4. Upon conclusion of the "open-ended" Grand Jury investigation, proceeded to disseminate the Grand Jury investigation results and materials up the chain of command of the Internal Revenue Service for determination at higher levels for its purposes what further action should be taken by the Internal Revenue Service.

5. Determined administratively how to best proceed to prosecute the case both criminally and civilly and towards both ends recommended indictment by the Grand Jury.

6. Orchestrated a summary testimony presentation principally through Special Agent Wordell's summarization of his investigation results of his prior combined investigative proceedings before a totally different Grand Jury to obtain an indictment.

In short, Respondents have contended that the IRS was left to pursue its

investigation using the sweeping powers of the Grand Jury with minimal involvement or supervision by that body or the U.S. Attorney, just as though it was a regular administrative Internal Revenue investigation.

It has been Respondents' contention in the courts below that such misuse of the Grand Jury by a Federal agency as a marshalling yard for combined civil and criminal purposes flies in the face of the most fundamental requirement that must be met before authorization for release of Grand Jury materials should be granted by any court for civil litigation purposes. That fundamental requirement is simply that the sweeping powers of the Grand Jury must have been used only for legitimate criminal purposes. As was noted by this Court in United States v. Proctor & Gamble Co., 356 US 677 (1958) at page 683:

> [The district court] also seemed to have been influenced by the

> fact that the prosecution was using criminal procedures to elicit evidence in a civil case. If the prosecution were using that device, it would be flouting the policy of the law. (emphasis added)

It has been Respondents' contention that one does not even get to the exceptions embodied in Rule 6(e) under which materials can be released if there is a material issue as to the misuse of the sweeping powers of the Grand Jury. In remanding the case to the district court, which had refused to consider the Grand Jury abuse issues in making its order, the Ninth Circuit, among other things, stated in its opinion below:

> "Any Grand Jury abuse that has occurred is relevant to the district court's decision whether to disclose, and the court should consider appellants' allegations of such abuse." (Government's Petition Appendix A, p. 17a).

While the Ninth Circuit stated this in connection with its discussion of

subsection (C) of Rule 6(e), Respondents point out that the question is fundamental to any release of Grand Jury materials to Government agencies for civil litigation under any subsection of Rule 6(e). It is only after this fundamental issue is resolved that the two issues raised by the Government by its petition in this case even come into play. This fundamental issue can only be resolved at trial court level after an evidentiary hearing permitting well supported allegations of Grand Jury abuse to be demonstrated. In this regard, in the sister case at oral argument on March 3, 1982, Respondents among other things, strongly urged the Ninth Circuit to remand and supplement the language of its prior ruling by specifying that the district court hold an evidentiary hearing on the issue of Grand Jury abuse as charged by Respondents.

5. Additional Possible Sister Case Issue

While it does not directly bear upon the issues in this case, Respondents feel constrained to advise the Court of one additional issue that has been raised in the briefing of the sister case that did not exist in the appeal to the Ninth Circuit in this case. That is whether release of Grand Jury materials to the Internal Revenue Service for civil tax collection purposes is actually "preliminarily to or in connection with a judicial proceeding" [6(e)(3)(C)(i)].

The additional argument in the sister case is essentially that the Government does not institute litigation for the collection of taxes. In fact, there is no assurance of any judicial proceeding in federal income tax matters at all because Internal Revenue Service examination procedures are designed to resolve any tax disputes in the administrative process.

During an audit the taxpayer has the right to a meeting with the examiner's supervisor if there are differences. After the examination report is filed, the taxpayer is also given the right to protest any finding of the examiner and is entitled to a review at an appeals conference within the Region. On legal issues, the taxpayer may even request that local Internal Revenue Service representatives obtain technical advice from the national office.

If the tax issues cannot be resolved administratively, there will be no judicial litigation unless the taxpayer initiates the lawsuit, since the Internal Revenue Service has the right to assess and collect the tax upon merely giving notice to the taxpayer. Thus, the assertion of a tax liability by the Internal Revenue Service cannot by itself be considered "preliminarily to or in connection with a judicial proceeding." [See, e.g., Internal

Revenue Service Publication 17 (rev. Nov. 1981) at pp. 26-27.]. This is the rationale adopted by the Seventh Circuit in Re the Special February 1975 Grand Jury [Baggot] 652 F.2d 1302 [7th Circuit 1981].

Respondents do not believe this issue is essential to resolution of the issues in the instant case. It does not directly bear on the fundamental Grand Jury issue underlying both this case and the sister case. There appears to be a split of authority between the Fourth Circuit and the Seventh Circuit on this narrow issue and it is quite possible that the Ninth Circuit may follow the rationale of Baggot, supra, and not have to address the "compelling and particularized need" issue in the sister case.[2/]

2/ See In re December 1974 Term Grand Jury Investigation, 449 F. Supp. 743 (Md. 1978) (permitting disclosure of grand jury materials to the Internal Revenue Service, and cited with approval in In re Grand Jury Subpoenas, April 1978, at Baltimore, 581 F. 2d 1103 (4th Cir. 1978), cert. denied, 440 U.S. 971 (1979)).

Until the Ninth Circuit renders its decision in the sister case, the parties before you simply do not know what impact that decision may have on the issues brought to this Court's attention by the Government.

ARGUMENT

I

The subsections of Rule 6(e) should be construed together; and, this Court does not yet have the issues fully determined and framed by the Ninth Circuit since a sister case has been submitted involving one of the two issues raised in the Government's petition.

Rule 6(e) must be considered in its totality. The parameters of the authorizations of subsection 6(e)(3)(A)(i) can only be properly considered in connection with the authorizations provided for under subsection 6(e)(3)(c)(i) to make sense out of the legislative scheme of Rule 6(e). Whether the language of "an attorney for the Government for use in the performance of such attorney's duty" [Rule 6(e)(3)(A)(i), FRCrim.P] is limited to the performance of such attorneys "to enforce federal

criminal law" [Rule 6(e)(3)(A)(ii), FRCrim.P] or is as definitionally broad as the Government asserts must be weighed in light of the entire legislative scheme of Rule 6(e) and the alternatives provided under subsection 6(e)(3)(C)(i) as developed by the various circuit courts below in numerous though somewhat inconsistent decisions. This Court does not yet have the benefit of the Ninth Circuit's finalized thinking on the applicability and standards of subsection 6(e)(3)(c)(i) as further developed by argument of the Government and Respondents in the sister case. This Court should not consider either issue raised by certiorari on these interrelated subsections of Rule 6(e) until the issues are fully developed and framed below.

II

<u>To permit Governmental agencies unrestricted access to Grand Jury materials for</u>

civil litigation purposes invites Grand Jury misuse by those agencies to accomplish civil litigation objectives. This is the fundamental problem that exists in this case as set forth in the discussion under subheading No. 4 of the Statement of The Case which must be considered by this Court in determining proper controls and safeguards over Government access under Rule 6(e).

The observation is inescapable that the combined potential mischief of a misuse of the sweeping powers of the Grand Jury coupled with an unrestricted wholesale turnover of Grand Jury materials for civil litigation purposes would tend to encourage the Internal Revenue Service and other Federal agencies to (1) use the Grand Jury as a convenient marshalling yard for civil as well as criminal purposes, (2) obtain such materials (possibly ex parte),

and then (3) use the materials as a bludgeon for civil litigation purposes. In this connection we refocus this Court's attention to the 1981 Seventh Circuit case Baggot, supra decision that is remarkably close to the facts in this and the sister case. While that recent Seventh Circuit case was previously cited for holding that an Internal Revenue Service civil tax collection was not "preliminary to or in connection with a judicial proceeding" under subsection 6(e)(3)(c)(i) of Rule 6(e), the court made the following observations that Respondents believe are extremely pertinent to the other issues in the instant case and the sister case:

> "We may not always be bound by a strict and literal interpretation of Rule 6(e) in the situation where there is some extraordinary and compelling need for disclosure in the interest of justice, and little traditional need for secrecy remains but as important as taxes are, their determination, assessment and collection does not satisfy

that standard. The IRS has other effective statutory means to accomplish its civil purposes which are generally sufficient . . . . . The issue also has significant impact, the government argues, because of the practical concerns which an adverse ruling would have on IRS's future cooperation with subsequent grand jury tax investigations if subsequent disclosure for the civil or other IRS purposes is restricted.

. . . . It is admitted that the government has alternative independent civil means to use for the purpose, but it is argued it will take longer. 'It is almost,' the United States Attorney argued, 'as though you have two different governments, one working against the other, rather than a single unified government of the United States trying to accomplish collection of taxes and prosecution for those who willfully violate the tax laws.' That may seem to be the case, but there are other considerations, however, beside taxes. One consideration which remains is the possible impact upon future grand juries, as wholesale subsequent disclosure might discourage free and untrammeled disclosures by persons having information with respect to the commission of crimes. United States v. Rose, 215 F.2d at 623-29. A liberal disclosure policy in tax cases would no

> doubt facilitate tax collection but it would also create a temptation to abuse the grand jury process. Perhaps few, if any, other countries are so zealous in protection of the individual rights of its citizens." (Baggot, supra at pp. 1306-07, emphasis added, footnotes deleted).

While Baggot was an Internal Revenue Service case and the instant case is a Navy case, the principles are the same. The abuse or misuse in the instant case was in fact by the Internal Revenue Service by which another agency of the same government now seeks to profit.

The arrogance of a Federal agency suggesting as apparently was suggested by the Government in Baggot (see emphasis) that the agency may not be so willing to cooperate with a Federal Grand Jury investigation unless it can have the unrestricted fruits of the sweeping criminal investigatory powers of the Grand Jury is astounding. It is this attitude that

led to the Grand Jury misuse in this case. It is the protections against such governmental arrogance and potential disregard of basic individual rights that our country and this Court have so zealously maintained that are involved in the fundamental question of Grand Jury abuse that underlies this entire case. Disputed civil claims should no more be collected by use of the proverbial "rubber hose" than criminal confessions should be so obtained.

Development of this fundamental Grand Jury abuse issue in this case and the sister case was improperly denied at the district court level as was discussed under the Statement of the Case. Whatever this Court decides with regard to granting or not granting Certiorari or with regard to the specific issues raised in the Government's position, the right to develop the fundamental question of whether the powers of the Grand Jury were misused in this

case, as was recognized by the Ninth Circuit, should not be overlooked.[3/]

Not only is that fundamental issue at the very threshold of the question whether the Government should be permitted access to the Grand Jury materials at all, but the facts, when developed, may well influence this Court as to its interpretation of Rule 6(e) and as to what are the appropriate safeguards to apply.

Unless and until there is major Grand Jury reform, it is through Rule 6(e) and the safeguards that Congress and the courts develop with regard to that rule that the potential mischief of future Grand Jury abuse or misuse will be deterred. We can think of few more important or fundamental questions that this Court could

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3/ See discussion and quotation from Ninth Circuit opinion under Statement of the Case, page 19 of this Response.

ever be asked to address involving our particular philosophy of governmental power, the balance of powers among our three branches of government, and basic individual rights as envisioned by our forefathers and carried into our Constitution.

CONCLUSION

Respondents have limited this Response to informing the Court more fully of the procedural posture of this case and the factual circumstances and context under which this case was taken on appeal and has been brought to this Court's attention.

Based upon that approach, Respondents simply urge the following:

1. The Government's petition is essentially premature since the Government and Respondents have one of the same issues still under submission in the Ninth Circuit.

2. Regardless of the ultimate determination by this Court of either of the issues raised on certiorari, the fundamental question of Grand Jury abuse or misuse and the limitation of accessibility of Federal agencies to the Grand Jury materials still must be resolved at trial

court level based upon an adequate hearing and appropriate record.

3. The Supreme Court should not consider the question of who is included in the term "attorneys for the Government in the performance of their duties" under FRCrimP 6(e)(3)(A)(i) in a vacuum but should consider it within the entire legislative scheme of Rule 6(e) and particularly in connection with the available alternatives of subsection 6(e)(3)(C)(i) and the standards that should be applied to the Government.

4. In connection with points one and three above, this Court should hold its determination to grant certiorari in abeyance until the Ninth Circuit's deliberations on the issue of "particularized and compelling need" (Rule 6(e)(3)(C)(i)) have been concluded and its opinion issued.

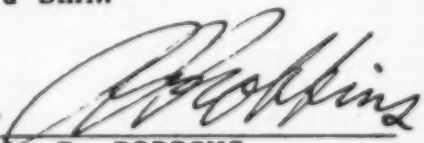
We qualifiedly join in inviting this Court to consider these extremely important

questions presented. The purpose of our Response is to urge that the Government's petition be considered on a timely and fully informed basis, not piecemeal and not coldly isolated from the realities of the factual circumstances in which these 6(e) orders were reviewed by the Ninth Circuit. We want this Court to know the full nature and significance of the issues this Court is being asked to address and the true factual context of the companion cases out of which the Government's petition has been brought.

March 26, 1982

Respectfully submitted,

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Supplemental Brief

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NO. 81-1032

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,

Petitioner,

v

SELLS ENGINEERING, INC., et al.,

Respondents.

RESPONDENTS' MEMORANDUM AS TO MOOTNESS AND CLARIFICATION OF MISLEADING INFERENCES IN PETITIONER'S REPLY BRIEF

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NO. 81-1032

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,

Petitioner,

v

SELLS ENGINEERING, INC., et al.,

Respondents.

I

MOOTNESS

A. Purpose and Approach of This Memorandum

Respondents have not been directly requested by this Court to submit this Memorandum. However, Respondents did receive a copy of a letter from the Chief Deputy Clerk of the Court which directed the Petitioner to file a memorandum addressing the question of mootness. In view of that request and in light of the fact that the issue of mootness was raised by Petitioner before the Ninth Circuit Court of Appeals which was the basis of the dissenting opinion, Respondents feel compelled to inform this Court of the substance of their arguments on the issue of mootness. At the outset Respondents note that Petitioner did not raise the issue of mootness in its Petition to this Court.

In view of the fact that Respondents will not have had an opportunity to see Petitioner's Memorandum prior to their filing this Memorandum, this Memorandum essentially addresses the substantive law and arguments Petitioner presented to the Ninth Circuit and to the arguments that we anticipate will be raised in this Court on that issue. Respondents specifically request, however, that the Court allow Respondents to respond as to matters raised

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in the Petitioner's Memorandum which may not have been fully addressed herein.

B. The Inconsistency of Petitioner's Arguments Below.

In the Ninth Circuit below, Petitioner argued that if Respondents were complaining of the United States' access to grand jury materials, their complaint was moot and if Respondents were complaining of the United States' use of grand jury materials, their complaint was premature. Petitioner further argued that if Respondents have suffered any damage from the use of the grand jury materials, they could seek suppression in the pending civil case. Finally, Petitioners argued that as it was too late for Respondents to complain of access to the grand jury materials, the appeal should have been dismissed as moot.

But in examining how the Petitioner would later apply its logic, the Petitioner has already demonstrated that it opts for expedience over principle as the circumstances of the moment may require. By way of background, and as set out in detail in Respondents' Brief in Response to Petition for Writ of Certiorari, the whole approach of the Internal Revenue Service ("IRS") in circumventing the stay orders pertaining to the administrative summonses by instituting a grand jury proceeding was based upon expedience. This same "expedient" approach by the Government is carried into the arguments of the Government in the appeal in this case. For when the Government argued mootness in its brief filed with the Ninth Cirucit it then claimed Respondents had a remedy of suppression available to them in the civil case. But when expedience later demanded that the Government take the exact opposite position, the Government showed no hesitation in so doing. At time of oral argument before, and later in a letter to the judges who heard the case in the Ninth Circuit, the Government then cited additional cases and stated, "...suppression in a civil case may not be an appropriate remedy in cases of grand jury abuse." [See Exhibit A

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attached hereto]. Obviously, the Petitioner made this switch to avoid being "hoisted with its own petard" in the separate False Claims action that it had commenced before the oral argument below was held. By the time of oral argument before the Ninth Cirucit Petitioner had they become concerned about facing evidentiary suppression arguments Respondents might make in the civil action and those arguments being reinforced by Petitioner's own statements advocating suppression as the appropriate remedy made in the briefs to the Ninth Circuit.

The Government actually did take the position later in the civil False Claims action that suppression in a civil case is not an appropriate remedy for grand jury abuse. It made this argument in support of its Motion to Stay the proceedings in the civil False Claims suit below. Respondents will not burden this Memorandum by attaching the Government's Briefs in the False Claims civil suit below. However, as an example of the arguments made by the Government, we attach as Exhibit B hereto the front page and table of contents of the Government's Supplemental Brief in Support of Motion to Stay. A quick look at the table of contents will easily reveal the positions the Government is taking in the main action as to the suppression issue, and yet, when briefing its argument to the Ninth Circuit Court in these proceedings, the Government contended that "the proper time to raise these issues is in a later civil case."

The argument has already come full circle in this very situation. The Petitioner has alredy argued it both ways depending upon the goals of the moment. Obviously its real goal is to prevent Respondents in <u>any</u> proceeding from presenting the very evidentiary matters regarding Grand Jury abuse for which the facts of this case cry out.

But in addtion to the Government's inconsistent approaches, there is no substantial merit to the proposition that the matters

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raised are moot. The practical essence of Petitioner's argument below is that, since the Government has already obtained the grand jury materials, Respondents have no practical remedy in challenging a Rule 6(e) order; and, no matter how wrong the grounds for the 6(e) order, Respondents lose all their legal right to challenge the propriety of the method in which the Government obtained such materials. This expedient "logic" flies in the face of long existing case law established by this Court.

C. This case meets neither of the two minimum test standards of mootness as set down by the Court in prior cases.

The test of "mootness" was enunciated by this Court in County of Los Angeles v. Davis, 440 U.S. 625, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979). That case involved the proposed use by Los Angeles County of an employment plan which would have discriminated against Blacks and Mexican-Americans. The plan was never implemented and this Court enunciated the test at page 631 as follows:

> "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486, 496 (1969). We recognize that, as a general rule, 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.' United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953). But jurisdiction, properly acquired, may abate if the case becomes moot because (1) it can be said with assurance that 'there is no reasonable expectation. . .' that the alleged violation will recur, see id., at 633; see also SEC v. Medical Committee For Human Rights, 404 U.S. 403 (1972), and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. See, e.g., DeFunis v. Odegaard, 416 U.S. 312 (1974); Indiana Employment Security Div. v. Burney, 409 U.S. 540 (1973). When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law. The burden of demonstrating mootness 'is a heavy one.' See United States v. W.T. Grant Co., supra, at 632-633.

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1. The effects of the violations under Rule 6(e) are ongoing:

The improper release of grand jury materials for civil litigation purposes starts a chain of procedures in which such materials are utilized, copied, destributed, broadcast and published in an ever widening arc as the action proceeds. In the False Claims action Petitioner actually sought a stay order pending final resolution of the appeal taken from the district court's Rule 6(e) order. By its own voluntary action Petitioner has sought to put its separate civil False Claims action in "limbo" in the trial court below pending the final outcome of these Rule 6(e) order appeal procedures. No activity is now proceeding in the court in the False Claims action.

This Court has the clear opportunity as a practical matter to prevent further broadcasting and use of secret grand jury materials by simply letting the Ninth Cicuit decision stand and the district judge to follow the mandate of that appellate court in its reversal and remand. This was essentially the stance taken by the Ninth Circuit in its decision.

"A case is moot when issues are no longer 'live' or parties lack a legally cognizable interest in the outcome." Powell v. McCormack, 89 S.Ct. 1944, 395 U.S. 486, 23 L.Ed.2d 491 (Co. 1969). Respondents' interest in the outcome of this appeal remains very much alive. If this Court supports the Ninth Circuit Court's order that questions of grand jury abuse are relevant to the granting of a 6(e) request for access to grand jury materials, then the case will be remanded to the district court for the purpose of such consideration.

A proper hearing at the district court level will permit an evidentiary demonstration that the information was improperly acquired by Agent Wordell through abuse of grand jury power and ought not to have been released for civil litigation purposes because of the "tainted" and abusive way in which it was obtained.

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After such a hearing, the District Court can limit its availability and use in additional civil proceedings.

An analogous situation is presented in Haig Berberian, Inc. v. Cannery Warehousemen, 535 F.2d 496 (9th Cir. 1976) where a dispute between a labor union and management (Haig) took place over an alleged grievance. The union maintained that the grievance was arbitrable whereas Haig maintained it was not. The District Court ordered that it was arbitrable. The arbitration was commenced and terminated. There was no possibility of "unarbitrating" the matter. An appeal was taken to the Court of Appeals and mootness was one of the issues raised. The Court stated at page 498, fn. 1:

> "The case is not moot because arbitration has been completed. If this court agreed that the dispute was non-arbitrable, the arbitration award would be unenforceable."

Similarly, if the district court finds that the grand jury process was abused the materials released could be retracted and suppressed to avoid improper use in future proceedings by the Government.

2. An issue is not moot when reasonable expectations exist that the violation will recur:

The likelihood of recurrence of illegal conduct is in and of itself sufficient to render a controversy "live" rather than moot. As stated in United States v. Phosphate Export Association, 393 U.S. 199 (1968) at 203:

> A case might become moot if subsequent events made it absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur. (Emphasis added).

The court in United States v. Phosphate Export Association, supra, held that a statement by appellees alone to the effect that there will be no repetition is not sufficient.

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The same rule is noted in Pacific Maritime Association v. International Longshoremen and Warehousemen's Union, 454 F.2d 262 (9th Cir. 1971) at page 263:

> Generally speaking, a case is moot when the parties lack a legally cognizable interest in the outcome. Powell v. McCormack, 395 U.S. 485, 496, 89 S. Ct. 1944, 23 L.Ed.2d 491 (1969). the outcome. Powell v. McCormack, 395 U.S. 485, 496, 89 S. Ct. 1944, 23 L.Ed.2d 491 (1969). 2d 491 (1969). But an issue remains "live" unless subsequent events make it absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur. United States v. Concentrated Phosphate Export Association, Inc., 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed. 2d 344 (1968).
> As the District of Columbia said in Friend v. United States, 128 U.S. App. D.C. 323, 388 F.2d 579, 581, (1967): '. . . cases are not made moot by brief duration capable of future repetition.'

The foregoing rule has been termed the "capable of repetion, yet evading review" standard of mootness and has been reiterated by this Court in numerous cases.

One of these cases, which provides an analogy to the case at bar is Nebraska Press Association v. Stuart, 427 U.S. 539 (1975). In the Nebraska Press Association case, a state court had made an order prohibiting the press from publishing or broadcasting accounts of confessions or admissions made by an accused, until a jury had been empanelled. The Nebraska Press Association brought a motion for stay of this order, which was denied by the state court. By the time the case reached the Court, the jury had been empanelled and in fact the trial was over. Therefore, the pre-trial publication order was no longer in effect.

One argument raised in the Nebraska Press Association case was that the case is moot. This Court rejected the argument stating at pages 546-547:

> Our jurisdiction under Art.III, Section 2, of the Constitution extends only to actual cases and controversies. Indianapolis School Commissioners v. Jacobs, 420 U.S. 128 (1975); Sosna v. Iowa, 419 U.S. 393, 397-403 (1975).

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> The Court has recognized, however, that jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one 'capable of repetition, yet evading review.' Southern Pacific Terminal Co.v. ICC, 219 U.S. 498, 515 (1911).
>
> . . . The dispute between the State and the petitioners who cover events throughout the State is thus "capable of repetition". yet, if we decline to address the issues in this case on grounds of mootness, the dispute will evade review, or at least considered plenary review in this Court, since these orders are by nature short-lived. See, e.g., Weinstein v. Bradford, 423 U.S. 147 (1975); Sosna v. Iowa, supra; Roe v. Wade, 410 U.S. 113, 125 (1973); Moore v. Ogilvie, 394 U.S. 814, 816 (1969); Carroll v. Princess Anne, 393 U.S. 175, 178-179 (1968). We therefore conclude that this case is not moot, and proceed to the merits.

A similar factual situation arose in Garnet Co., Inc. v. DePasquale, 443 U.S. 368 (1979) where a newspaper owner brought a proceeding to vacate two trial court orders excluding the public and press from a pretrial suppression hearing in a murder case. By the time the case had reached the court of appeals, the transcript of the suppressed testimony had been released to the petitioner. Nevertheless, this Court stated at 377:

> "We consider first, the suggestion of mootness .... We conclude that this aspect of the case 's governed by Nebraska Press Assn. v. Stuart, 427 U.S.539, 546-547, 96 S.Ct.2791, 2796-2797, 49 L.Ed.2d 683, and that the controversy is not moot. The petitioner, of course, has obtained access to the transcript of the suppression hearing. But this Court's jurisdiction is not defeated, id., at 546, 96 S.Ct., at 2797, "simply because the order attacked has expired, if the underlying dispute between the parties is one 'capable of repetition, yet evading review.' Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911)."

The reason for the foregoing rule is discussed in Moore's Federal Practice, Vol. 6A, p. 57-133:

> "The performance of the particular act sought to be enjoined may moot the injunction issue, but where there is a likelihood that the act complained of will be repeated, the issues

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> remain justifiable, and a declaratory judgment may be rendered to define the rights and obligations of the parties. This is particularly true when the behavior underlying the action is such that in the nature of things the immediate controversy will be terminated before the underlying right can be heard on on appeal. In such cases a strict adherence would leave the plaintiff always suspended between prematurity and mootness." (Emphasis added)

A case will not be considered moot where the controversy is a continuing one. Bullock v. Carter, 405 U.S. 134, 142 (1971), footnote 17. In Bullock the petitioner contested the state requirement of a certain filing fee as a condition of running for public office. Although the election was over by the time he came before this Court, the controversy was not considered moot. A similar holding was made in Moore v. Ogilvie, 394 U.S. 814 (1968) where petitioners who were attempting to get on a ballot challenged the Illinois election law. Although the election was over by the time the case was before this Court, the Court noted that "the problem is capable of repetition, yet evading review" and that therefore "the need for its resolution thus reflects a continuing controversy . . ." (page 816). And finally, in a similar ruling in Gray v. Sanders, 372 U.S. 368 (1962) this Court, in reviewing Georgia's election procedures, held that the case was not moot ". . . for if the case were dismissed as moot appellants would be 'free to return to ...[their] old ways'." (page 376).

In United States v.New York Telephone Company, 434 U.S.159 (1977) a district court ordered that the F.B.I. could apply pen registers to the telephone lines of certain persons and it ordered New York Telephone Company to assist the F.B.I. in so doing. New York Telephone Company objected and the matter came before this Court on certiorari. This Court held that the case was not moot and stated at page 165:

> "Although the pen register surveillance had been completed by the time the Court of

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Appeals issued its decision on July 13, 1976, this fact does not render the case moot, because the controversy here is one "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911); Roe v. Wade, 410 U.S. 113, 125 (1973)".

D. Conclusionary Arguments on Mootness.

In fact, nothing has happened after the Rule 6(e) order of the court below to render the decision moot. Cases of mootness generally involve an intervening event that follows the decision below, such as a change of law or statute, the settlement of a controversy, the decision in a collateral proceeding or the running out of a time period. But here, if mootness were to ensue it would be the result of the order itself (i.e., the disclosure) and not something intervening. To permit such a result would be to render all orders authorizing disclosure (under Rule 6(e) or otherwise) irreversible because presumably the disclosure would have been effected prior to the appeal. Such a cloak of unreviewability obviously cannot be permitted to exist.

In the case at bar it is clear that there will be future use made of the evidence released to the Government. It will be used in the existing civil suit based on the False Claims Act which the Government has filed subsequent to the Rule 6(e) Motion. Furthermore, since this proceeding has been instituted, the Justice Department, on behalf of the I.R.S., has again elected to proceed by way of a Rule 6(e) motion for disclosure of grand jury materials to the I.R.S. and its personnel so it can investigate possible civil tax liability. The reasonable possibility of recurrence is not only clear, but has in fact already occurred among these very parties. Respondents would never be able to appeal, but would always be "mooted out of court" by a court's order of disclosure in each subsequent recurrence. This clearly presents a controversy "capable of repetition, yet evading review."

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Similarly, the continued use of these grand jury materials is in and of itself a constant recurrence since the use, duplication and analysis of these materials continues. The release of the grand jury materials is not a momentary event of which the effects are over immediately. Rather, as the disclosure order remains in effect each day, more adverse effects and continued violations of the law persist.

The Government claims that if Respondents are complaining of the use of grand jury materials such complaint is premature. However, the use which the Government is making of the grand jury materials is not a future use. It is a use commencing from when such materials were released and which is now ongoing and continuing. The scope is limited only by their voluntary election not to pursue the civil action further until the Rule 6(e) order appeal here involved is fully resolved. Respondents have a right to stop this ongoing use. It is anything but premature. As time proceeds the use which the Government makes of the materials just accumulates and the possibility of the Respondents preventing such use becomes less and less.

If this Court were to consider the case herein moot, presumably it would render an order in conformance with United States v. Munsingwear, 340 U.S. 36 (1950). As stated in that case at page 39:

> "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here, or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."

Following the procedure in Munsingwear, this Court in Weinstein v. Bradford, 423 U.S. 147 (1975), held that the case before it was moot, that the judgment of the Court of Appeals was vacated and that the case was remanded to the District Court with instructions to dismiss the action. Respondents submit that to issue such an order would not only be improper in view

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of the principles enunciated above regarding mootness, but that its effects would be unjust and undesirable from a legal point of view for several reasons.

The first undesireable effect would be that the vacation of the decision of the Ninth Circuit Court of Appeals would render that decision of no precedential value. In other words, the conflict that now exists between the Circuits as to the applicability of Rule 6(e) of the Federal Rules of Criminal Procedure would evaporate by the simple act of nullifying a decision of one court. Respondents submit that this is an inapproriate method to resolve the conflict. Furthermore, presumably, the facts which make this case moot would exist in future cases so that there will never be a Circuit Court of Appeals decision which would be able to hold what the Ninth Circuit did in this case. Therefore, all future conflict between the Circuits would be eradicated. Respondents submit that this procedure not only provides a closed circle of unreviewability, but it also lets stand as unchallenged precedent those cases which conflict with the Ninth Circuit's decision below.

The Second undesireable effect would be that in ordering the District Court to dismiss the Rule 6(e) order below, and to dismiss the petition, the net result would be that the civil division attorneys and their staff will have obtained grand jury materials <u>without</u> a court order. One thing that is <u>not</u> in dispute here is that at least a court order is mandated under Rule 6(e). But the very issue in this case is what kind of order and what standards are to be applied. Should <u>civil</u> division attorneys for the Department of Justice be permitted to obtain grand jury materials by a court order under Rule 6 (e)(3)(A), as "attorneys for the government", or should they be required to obtain a court order under Rule 6(e)(3)(C)? And, in <u>either</u> situation, should not the District Court have considered allegations of grand jury abuse?

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The third undesireable effect that would result from this Court rendering an order of mootness would be the nullification of the Ninth Circuit's decision as to matters not raised by the Government in its Petition for Writ of Certiorari. For the Ninth Circuit not only addressed the two issues raised by the Government, but it also addressed the issue of grand jury abuse, which is a threshold issue distinct from the issues of the proper disclosure standards spelled out under Rule 6(e). The Ninth Circuit Court below clearly stated that any grand jury abuse that has occurred is relevant to the district court's determination whether to disclose, and the district court should consider Respondents' allegations of such abuse. But if the decision below is vacated, the part of the Ninth Circuit's decision relating to grand jury abuse will also be vacated. This would result in the issue of grand jury abuse being totally ignored by the District Court.

Finally, Respondents have expended substantial efforts in attempting to obtain judicial recognition of their position as to the disclosure of grand jury materials which they feel were amassed in an improper and illegal manner. They have done the same in obtaining judicial recognition that; (a) the civil division attorneys of the Department of Justice are not entitled to the same broad access privileges to grand jury materials as criminal division attorneys in the performance of their duties; and, (b) the civil division attorneys of the Department of Justice have no less a burden than a particularized and compelling need, just as any citizen of the United States of America. The Government has now twice obtained access to the same materials against vigorous opposition based on well reasoned objections. To declare this case moot after the travails of the Respondents in both cases (Sells I and Sells II as these cases are referred to by the Government), would be an unfortunate waste of judicial, lawyerly

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and financial resources expended by all to date in developing these very important procedural issues.

II

CLARIFICATION OF MISLEADING INFERENCES IN PETITIONER'S REPLY BRIEF

Respondents seek to clarify certain matters raised in Petitioner's Reply Brief which have misleading implications and connotations.

A. Respondents Have Not Addressed The Merits in Petitioner's Petition For Writ of Certiorari Since That Is Not Procedurally Called For Unless And Until The Petition Has Been Granted.

The Government contends at page 1 of its Reply Brief that nowhere in their Brief do Respondents take issue with the arguments advanced in the Petition concerning the soundness of the Ninth Circuit Court of Appeals' decision or the impact it will have upon the Department of Justice's ability to protect the United States from fraud. The Government also claims that the Respondents have failed to meet the Government's contentions directly.

Such comments are uncalled for. One can only assume that what the Government is trying to infer or suggest is that in so doing the Respondents have acquiesced or concurred in the Government's contentions. Such an inference as suggested by the Government is not only incorrect and unfounded, but it displays a disregard of the applicable rules of procedure of this Court.

Rule 22 of the Rules of this Court ("USSC RULES") permits a Respondent the opportunity to respond to a petition for writ of certiorari by filing an opposing brief. This response relates to the grounds and reasons underlying a decision to deny or grant the petition for writ of certiorari. The response is not designed under the rules to address the merits of the contentions raised in the petition for writ of certiorari.

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USSC Rule 23 states that the Supreme Court will review the papers distributed pursuant to Rule 22 and will then enter an appropriate order. USSC Rule 23.2 provides that if a petition for writ of certiorari is granted, "the case will then stand for briefing" after counsel have been notified. It is then that the merits of the Government's arguments will be addressed directly. Obviously the purpose of these endeavors is to render an appropriate decision as to whether the issues should be considered by the court, not to decide the issues on the merits.

If the petition for writ of certiorari is ultimately granted by this Court, the Respondents intend to refute and rebut the Government's substantive contentions vociferously as they are most deserving of such refutation. In fact, because of the broad applications and expansive effect of an order in this case by the court, and the importance of the issues involved it can be expected that numerous third parties representing law enforcement agencies and criminal defense associations will take an interest in the case and file briefs amicus curiae on the merits pursuant to USSC Rule 36. However, the substantive merits need not be addressed by anyone, including Respondents, unless and until the United States Supreme Court has granted the petition for writ of certiorari.

If the petition for writ of certiorari is denied by the Supreme Court, then no response on the merits to this Court will be required of Respondents and the parties can get on with the issues and merits to be considered by the district court based upon the remand.

B. The District Court Below Did Not Resolve The Grand Jury Abuse Issue.

The Government indicates that in both Sells I and Sells II (utilizing the case identification terminology employed by the Government), the district court denied the Respondents' allegations

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of grand jury abuse. (see pages 6, 7, 8 and 9 of Government's Reply Brief.) It also alleges that this indicates tnat Respondents' allegations of grand jury abuse are without merit. (See pages 8-9 of Government's Reply Brief).

Respondents wish to focus upon these statements of the Government to the Court because of the misimpression they create. The inference created is that the Respondents had a full opportunity to present their case of grand jury abuse in the district court, that the matter was heard by the district court and that the matter was decided adversely to Respondents by that court on the merits. This inference is totally false!

In both Sells I and Sells II, the district court judge denied Respondents the right to present their case of grand jury abuse. In fact, in the Sells II sister case, Judge Thompson stated that there was no grand jury abuse as a matter of law, and the Respondents were therefore not even entitled to raise such issues. In the Ninth Circuit decision, the court instructed Judge Thompson to consider the issue of grand jury abuse on remand. In Sells II, the Respondents are among other things, seeking to overturn Judge Thompson's ruling stating that as a matter of law Respondents are not entitled to a consideration of the grand jury abuse issue. Respondents are seeking reversal by the Ninth Circuit on that issue as there is no distinction that can be drawn between Sells I and Sells II regarding that issue. It is Respondents' contention that the issue presents a threshold question before the interpretation of Rule 6(e) need be addressed.[1] Therefore, any impression intended by Petitioner that there was a determination of the grand jury abuse question on its merits at the trial court level is false.

/ / /

[1] See pp 12-20 of Repsondents' brief in response to the Petition for a discussion of the grand jury abuse question that actually underlies both Sells I and the Sells II sister case.

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III

CONCLUSION

Whether this Court chooses to hear the Petition for Writ of Certiorari or not, Respondents submit that the issues determined below are not moot, that the issues are live, that the parties have a continuing interest in their determination and that the actions complained of are "capable of repetition yet evading review."

Dated: April 23, 1982

Respectfully submitted,

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October 9, 1980

The Honorable Jerome Farris
United States Circuit Judge
United States Court of Appeals
for the Ninth Circuit
U. S. Courthouse
312 North Spring Street
Los Angeles, California 90012

Re: In Re Grand Jury Investigation, Sells Engineering, Inc. et al. v. United States, No. 78-3709

Dear Judge Farris:

During oral argument in the above-captioned case, counsel for the Government, Stephen D. Altman, indicated that he would supply the Court with citations for the proposition that suppression in a civil case may not be an appropriate remedy in cases of grand jury abuse. These citations are: United States v. Havens, 48 U.S.L.W. 4596 (May 27, 1980); United States v. Payner, 48 U.S.L.W. 4629 (June 23, 1980); and United States v. Salvucci, 48 U.S.L.W. 4885 (June 25, 1980).

Very truly yours,

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EXHIBIT A

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. PETER A. SELLS, FRED R. WITTE, ROBERT E. TUCKER, RICHARD H. TEERLINK, SELLS, INC., CENTER GLASS CO. NO. 3, INC., BECKER ENGINEERING, INC., B&W INVESTMENTS, and JLM, INC., Defendants.	)	Civil No. 79-1282-K(H) PLAINTIFF'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR STAY

EXHIBIT P

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Supreme Court, U.S.
FILED
APR 14 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1032

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

SELLS ENGINEERING, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondents "do not dispute the importance of the issues raised by the Government's petition or the existence of the split of authority" (Br. in Opp. 2) noted in the petition. Indeed, nowhere in their response do respondents take issue with the arguments, advanced in the petition, that demonstrate the unsoundness of the court of appeals' decision and the serious adverse impact it will have upon the Department of Justice's ability to fulfill its responsibility to protect the United States from fraud. Instead of meeting our contentions directly, respondents suggest only that disposition of the petition be deferred for a variety of reasons relating to the pendency of other cases or the existence of other issues that, they argue, have to be resolved in further proceedings in this case. As we demonstrate below, however, because the other cases and issues raised by respondents are unrelated to the questions presented in our petition, there is no reason to defer disposition of the petition in this case.

1. Respondents correctly observe (Br. in Opp. 4-12) that the present petition seeks review of a decision of the court of appeals governing but one aspect of ongoing litigation between themselves and the government pertaining to respondents' practices that are alleged to create civil and tax liabilities to the United States. Respondents, however, have seriously mischaracterized the relationship between this case and one now pending before the United States Court of Appeals for the Ninth Circuit, *Sells* v. *United States*, No. 80-5829, as well as the issues in this case itself. In order to place respondents' contentions in perspective some background is required.

a. In late 1973 Agent Mark Rogers of the IRS Audit Division was assigned to conduct an audit of respondents and related business entities in order to determine each taxpayer's income tax liabilities for the tax years ending in 1972 and 1973. The audit was intended exclusively for tax determination and assessment. In the course of his examination, however, Agent Rogers discovered what he believed to be indications of fraud. Following established procedures, the agent referred the matter to the Intelligence Division of the IRS for a determination whether there was sufficient evidence of criminal violations of the Internal Revenue Code to warrant referral for prosecution. The investigation was assigned to Agent Edwin W. Wordell of the Intelligence Division.

In 1975, Agent Wordell issued administrative summonses pursuant to Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.) in an attempt to compel production of certain records that various taxpayers had refused to provide voluntarily. In separate orders issued on July 29, 1975, August 7, 1975, and January 23, 1976, the district courts for the Southern and Central Districts of California denied

respondents' various motions to quash the summonses and granted enforcement.[1] Appeals were taken from the enforcement orders by the defendants and their associates.[2] Respondents argued on appeal that Agent Wordell had impermissibly employed administrative summonses to establish criminal violations.[3] The district court for the Southern District of California stayed enforcement of the summonses pending the appeals.

During the more than two-year interval while those appeals were pending, Agent Wordell concluded, on the basis of information already available, that sufficient evidence existed to show that respondents had committed criminal acts and to warrant a recommendation that a grand jury be convened to investigate the matter. After processing through the IRS hierarchy and transmittal to the Department of Justice, the Tax Division of this Department approved the recommendation. In August 1976, a federal grand jury in the Southern District of California commenced an investigation of possible criminal conduct by respondents. IRS Agents Rogers and Wordell were detailed to assist the United States Attorney in conducting that investigation and were instructed by the responsible Assistant United States Attorneys not to employ any

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[1]Enforcement of a single summons directed at a business not a party to this case was denied.

[2]*United States* v. *Center Glass Co. No. 3*, Nos. 75-3025 through 75-3029, 76-1620, and 76-1900 (9th Cir.). The government cross-appealed from denial of enforcement of a single summons (see note 1 above). *United States* v. *Witte*, No. 76-1954 (9th Cir.).

[3]*United States* v. *Center Glass Co. No. 3*, Nos. 75-3025 et al. (9th Cir. Oct. 13, 1978), slip op. 3; see also Brief for Appellants at 20-26, *United States* v. *Center Glass Co. No. 3, supra*. Respondent's contention in *Center Glass Co. No. 3* is plainly irreconcilable with this Court's subsequent decision in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978). As explained below (page 5, *infra*), however, the court of appeals never reached the merits in that case.

information gained in that process for any purpose other than assisting in the grand jury investigation.

In the course of the criminal investigation, grand jury subpoenas were issued compelling production of virtually all of the financial records of the taxpayers. In one instance respondent Witte refused to comply with a grand jury subpoena requiring production of certain documents of a corporate entity with which he was associated. The United States District Court for the Southern District of California found Witte to be a recalcitrant witness within the meaning of 28 U.S.C. 1826(a), and Witte appealed. The court of appeals affirmed. *Witte* v. *United States*, 544 F. 2d 1026 (9th Cir. 1976). The court rejected, *inter alia*, Witte's contention that a protective order should have been granted denying the IRS agents assisting the grand jury access to subpoenaed documents. Witte argued that such documents might be turned over to the IRS and used as part of the ongoing administrative investigation of his tax liability, which was then in repose pending the appeals from the summons enforcement orders. The court of appeals rejected this claim, holding that, because of the agents' special expertise, the grand jury need not be denied their assistance. *Id.* at 1029. As for the use of subpoenaed documents in civil tax litigation, the court simply stated (*ibid.*):

> Whether such records can be used as evidence in a future hypothetical civil litigation can be properly decided on a timely motion to suppress in such case.

The term of the grand jury originally employed to investigate respondents was due to expire in November 1977. Because the case was then insufficiently developed to warrant indictment, the investigation was continued by a second grand jury, convened in May 1977. Pursuant to subpoena the grand jury ultimately secured virtually all of

respondents' tax-related financial records.[4] After presentation of evidence to the grand jury, on April 13, 1978, indictments were returned against respondents and two other individuals. Respondents were charged with two counts of conspiracy to defraud the United States (18 U.S.C. 371) and nine counts of tax fraud (26 U.S.C. 7206(2)).[5]

At oral argument on respondents' appeals from the district court's enforcement of the administrative summonses, the court of appeals was advised that some or all of the documents subject to the disputed summonses were likely to be in the possession of the grand jury. In view of the likelihood that the grand jury already had the disputed materials, coupled with the enactment of 1977 amendments to Fed. R. Crim. P. 6(e) that require a court order to authorize disclosure of grand jury material to persons, other than attorneys for the government, assisting in criminal investigation or enforcement,[6] the court of appeals declined to reach the merits, stating: "[W]e deem it appropriate that the respective district courts should first have the opportunity to consider the issues and resolve them." *United States* v. *Center Glass Co. Nos. 3*, No. 75-3025 et al. (9th Cir. Oct. 13, 1978), slip op. 4.[7] Because of the availability of other avenues for investigation (see pages 7-8, *infra*),

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[4]Because the grand jury investigation was focused on criminal tax fraud, the information called for by the grand jury subpoenas was essentially the same as that sought by the IRS through issuance of administrative summonses.

[5]The scheme charged is summarized in our petition at page 4.

[6]Compare Fed. R. Crim. P. 6(e)(3)(A)(ii) and 6(e)(3)(B) with Fed. R. Crim. P. 6(e)(3)(C)(i); see Pet. 2-3, 14-16.

[7]The court of appeals affirmed the district court's refusal to enforce one particular summons. *United States* v. *Center Glass Co. No. 3*, *supra*, slip op. 4; see notes 1 & 2, *supra*.

the IRS did not pursue the enforcement proceedings upon remand and, at the government's suggestion, the enforcement actions were ultimately dismissed (Pet. App. 2a n.1).

Shortly thereafter, respondents Sells and Witte each moved to dismiss the indictment, alleging various defects in the grand jury process pertaining primarily to the manner in which evidence was alleged to have been presented or withheld. They also sought wide-ranging discovery into the grand jury proceedings. Finally, respondents claimed that because the grand jury subpoenas sought the very information covered by the outstanding IRS administrative summonses, the issuance of grand jury subpoenas was designed to evade the district court's stay pending appeal of its order enforcing the IRS administrative summonses,[8] and that this practice constituted "corruption of the Grand Jury process as a means of obtaining evidence for a mixed criminal and civil purpose," and "flaunts [*sic*] the policy of the law and is an abuse of the Grand Jury" (Witte Memo. in Support of Motion to Dismiss Indictment at 6).

As explained in our petition (Pet. 5-6), on December 15, 1978, respondents Sells and Witte each entered a plea of guilty to one count of conspiracy to defraud the United States, and withdrew their allegations of grand jury abuse. All other criminal charges against respondents were dismissed. Prior to entry of the guilty plea, however, on December 7, 1978, the Civil Division of the United States Department of Justice filed the motion that gave rise to the instant case, seeking disclosure of grand jury materials for use in evaluation of and prosecution of a potential False Claims Act suit. In opposing that motion respondent Witte, *inter alia*, referred the court to his papers alleging grand jury

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[8]This contention had already been rejected by the court of appeals in *Witte* v. *United States*, *supra*, 544 F. 2d at 1029. See page 4, *supra*.

abuse filed in the criminal case.[9] The government denied the abuse allegation, and its motion for disclosure was granted on December 18, 1978.[10] Respondents appealed and the court of appeals reversed ("*Sells I*"). See Pet. 8-9. In *Sells I*, the court did not directly pass upon the grand jury abuse issue, but merely stated (Pet. App. 17a):

> Any grand jury abuse that has occurred is relevant to the district court's decision whether to disclose [grand jury material to the Civil Division under Fed. R. Crim. P. 6(e)(3)(C)(i)], and the court should consider [respondents'] allegations of such abuse.

This petition followed.

On June 5, 1980—while this case was pending before the court of appeals, and one-and-a-half years after the granting of the Civil Division's motion for disclosure of the grand jury materials—a similar motion was filed by the United States seeking authority to disclose documents considered by the grand jury, and grand jury transcripts, to the IRS, to enable it to conduct an income tax audit of respondents and several affiliated taxpayers. In opposing this application, the taxpayers repeated their allegations of grand jury abuse based upon the participation of IRS personnel in the grand jury investigation, again relying upon the motion filed but later withdrawn in the criminal case. They also argued that the government had not shown a particularized and compelling need for disclosure. See *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979). Respondents acknowledged, however, that release to IRS for tax assessment

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[9]However, respondent Witte's opposition was filed prior to entry of his guilty plea, and was explicitly premised on the assumption that the abuse issue would be decided in the criminal case.

[10]The district court concluded that withdrawal of the allegation of grand jury abuse mooted that question, but stated nonetheless that he would have found that there was no abuse (Pet. App. 24a).

purposes was "preliminarily to * * * a judicial proceeding" within the meaning of Fed. R. Crim. P. 6(e)(3)(C)(i). The district court found that no grand jury abuse had occurred, noting, *inter alia*, that the grand jury proceedings had produced indictments against respondents, and granted disclosure, albeit on more restrictive terms than the IRS had sought. Following denial of a stay, the materials were disclosed.

The taxpayers appealed. *Sells* v. *United States*, No. 80-5829 (9th Cir.) ("*Sells II*"). The appeal was argued on March 3, 1982, and awaits decision. It is the government's contention that, because they were the only issues raised in the district court, the only issues open on appeal are the grand jury abuse question and the standard to be applied in passing on the IRS's disclosure request.[11] Nonetheless, after the government had called the court's attention to the Seventh Circuit's decision in *United States* v. *Baggot*, 662 F. 2d 1232 (1981), respondents also argued for the first time in their reply brief that release to the IRS was not "preliminarily to * * * a judicial proceeding."[12]

b. Contrary to respondents' suggestion (Br. in Opp. 25-26) there is no reason to defer disposition of the petition in this case pending the Ninth Circuit's decision in *Sells II*. First, as the foregoing background indicates, the allegation of grand jury abuse to which respondents devote so much attention (Br. in Opp. 12-20) is simply not an issue in this

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[11]Of course, the latter question was resolved adversely to the government by the court of appeals in *Sells I* and is a question presented by our petition in this case. In *Sells II*, the government has also argued as alternative grounds for affirmance that part of the case is moot and that some of the documents sought by the IRS are not "matters occurring before the grand jury" and hence not covered by Rule 6(e)(2) at all. Compare Pet. 11-12 n.8.

[12]That is the holding of *Baggot*. See page 10, *infra*.

case, although it is properly presented in *Sells II*. The court of appeals in *Sells I* did not decide whether there was any grand jury abuse present, and accordingly this Court would not, in any event, reach the issue. *United States* v. *Mitchell*, 445 U.S. 535, 546 n.7 (1980). Nor was there any reason for the court below to reach the grand jury abuse issue in *Sells I*, for the factual question whether or not there was grand jury abuse *in this case* has no bearing on the prior questions—which are purely legal—that are presented by our petition. While it may be argued—as the *Sells I* court suggested—that the possibility of abuse generally has some bearing on the scope of extrajudicial disclosure permitted by Fed. R. Crim. P. 6(e)(3)(A)(i) (see Pet. App. 12a), or upon the standard to be employed in passing upon government disclosure requests under Fed. R. Crim. P. 6(e)(3)(C)(i) (see Pet. App. 17a),[13] like the court of appeals below we can conceive of no reason in law or policy to defer resolution of these generic threshold legal questions, pending determination of this case-specific factual question.

In any event, respondents' claims of grand jury abuse are entirely insubstantial, especially in the setting of this case. First, the district courts in *Sells I* and *Sells II* found these charges devoid of merit. Second, the facts that indictments were returned and convictions secured against respondents tend powerfully to refute any claim of abuse. Indeed, the claim of "abuse" raised in the criminal case and incorporated by reference here was merely that of a mixed civil and criminal purpose. Finally, and perhaps most significantly, respondents have never alleged that the grand jury proceedings were initiated for the purpose of establishing civil liability under the False Claims Act, as opposed to the

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[13]Of course, as we explain in our petition (at 17-18, 20-21), apprehension of grand jury abuse cannot justify the rules adopted by the court of appeals. Were abuse to be demonstrated on remand, a proper remedy would remain available.

Internal Revenue Code. Clearly then, the grand jury abuse issue has no place in this case at this juncture. There is no reason to await the decision of the court of appeals in *Sells II*.[14]

2. Respondents have also suggested (Br. in Opp. 21-23, 28-30) the relevance to our petition of the recent decision in *United States* v. *Baggot*, 662 F. 2d 1232 (7th Cir. 1981). In that case, which resembles *Sells II* (but not *Sells I*) in significant respects, the IRS sought disclosure of documents and grand jury materials for the purpose of determining the taxpayer's civil liability. The district court granted disclosure of certain documents on the ground that they were not matters occurring before the grand jury, but held that disclosure of other materials was not authorized by Rule 6(e)(3)(C)(i), reasoning that release to IRS is not "preliminarily to * * * a judicial proceeding." The court nonetheless granted disclosure, invoking a general supervisory power over the grand jury. A divided court of appeals reversed, holding that all of the disputed materials were matters occurring before the grand jury, that the district court's resort to supervisory power was improper on the

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[14]There is little reason to expect that the Ninth Circuit will alter its view of the showing required when the government seeks disclosure under Rule 6(e)(3)(C)(i) in *Sells II*. Indeed, the court of appeals has been advised of the filing of the present petition, and the government has suggested that the court may wish to defer disposition of *Sells II* pending this Court's disposition of *Sells I*. In any event, in *Sells II*, the government, while criticizing this aspect of the *Sells I* decision, maintains that it met the particularized and compelling need standard and has advanced other alternative grounds for affirmance unrelated to the issues in this case. See note 11, *supra*.

The final issue that could be reached in *Sells II*, whether or not release to IRS for tax computation is authorized by Rule 6(e)(3)(C)(i) (see page 8, *supra*), is not presented in *Sells I*, although it is presented by our forthcoming petition in *Baggot* (see page 10, *infra*). The potential presence of this issue in *Sells II* therefore does not militate in favor of holding the petition in *Sells I*.

facts and record of the case, and that release to the IRS was not "preliminarily to * * * a judicial proceeding."

Because of the substantial adverse impact of the *Baggot* decision upon the IRS's ability to fulfill its responsibilities for civil tax audits and assessment, and because the *Baggot* court's ruling on the availability of grand jury materials to the IRS under Rule 6(e)(3)(C)(i) conflicts with the Eighth Circuit's recent decision in *In re Judge Elmo B. Hunter's Special Grand Jury Empaneled September 28, 1978*, 667 F. 2d 724 (1981), the Solicitor General has authorized the filing of a petition for a writ of certiorari in *Baggot* limited to the "preliminarily to * * * a judicial proceeding" issue. That petition is due to be filed on April 19, 1982. As respondents recognize (Br. in Opp. 23), that issue in *Baggot* is unrelated to any issue in *Sells I.*

3. Respondents have "qualifiedly join[ed] in inviting this Court to consider the[] extremely important questions presented" by the government's petition (Br. in Opp. 35-36). As we have explained, however, respondents' claims of prematurity are insubstantial, and there is no reason to defer action on the pending petition.

For the foregoing reasons and the reasons stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

APRIL 1982

DOJ-1982-04

Petitioner's Brief

Office - Supreme Court, U.S.
FILED
AUG 6 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1032

In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

v.

SELLS ENGINEERING, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an attorney serving in the Civil Division of the United States Department of Justice engaged in preparing a civil fraud action under the False Claims Act is "an attorney for the government * * * perform-[ing] such attorney's duty" within the meaning of Federal Rule of Criminal Procedure 6(e)(3)(A)(i), and accordingly is entitled to examine relevant grand jury materials without judicial authorization.

2. Whether (i) Department of Justice attorneys engaged in preparing a civil fraud action under the False Claims Act, if not entitled to access to grand jury materials without judicial authorization, and (ii) any support or technical personnel needed to assist such attorneys, must demonstrate a "particularized and compelling need" in order to obtain access to grand jury materials.

PARTIES TO THE PROCEEDING

The respondents, in addition to Sells Engineering, Inc., are Peter A. Sells and Fred R. Witte.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1032

UNITED STATES OF AMERICA, PETITIONER

v.

SELLS ENGINEERING, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 642 F.2d 1184. The oral opinion of the district court (Pet. App. 22a-24a) and the district court's order (Pet. App. 25a-26a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20a) was entered on April 2, 1981, and a petition for rehearing was denied on August 6, 1981 (Pet. App. 21a). On October 27, 1981, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari until December 2, 1981. The petition for a writ of certiorari was filed on that date and was granted on May 3, 1982 (J.A. 47a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

FEDERAL RULES INVOLVED

Pertinent portions of the Federal Rules of Criminal Procedure are reproduced in the appendix to this brief.

STATEMENT

1. In May 1977, a federal grand jury was convened in the Southern District of California to investigate possible criminal conduct by respondents Peter A. Sells, Fred R. Witte, and Sells Engineering, Inc. (Pet. App. 2a).[1] Both Witte and Sells were officers of Sells Engineering, Inc. That company had contracts with the United States Navy to produce airborne electronic devices designed to interfere with enemy radar systems.

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[1] The May 1977 grand jury continued an investigation commenced by a predecessor grand jury in August 1976. Because the term of the earlier grand jury was due to expire in November 1977, and the case was then insufficiently developed to warrant indictment, the investigation was assumed by the May 1977 grand jury.

Commencement of the initial grand jury investigation resulted from a recommendation by the Internal Revenue Service to the Department of Justice. The IRS' interest in respondents was initially purely civil. In late 1973 Agent Mark Rogers of the IRS Audit Division was assigned to conduct an audit of respondents and related business entities in order to determine each taxpayer's income tax liabilities for the tax years ending in 1972 and 1973. In the course of his examination, however, Agent Rogers discovered what he believed to be indications of fraud. Following established procedures, the agent referred the matter to the Intelligence Division of the IRS for a determination whether there was sufficient evidence of criminal violations of the Internal Revenue Code to warrant referral for prosecution. See *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978). The investigation was assigned to Special Agent Edwin W. Wordell of the Intelligence Division. Agent Wordell eventually concluded that sufficient evidence existed to show that respondents had committed criminal acts to warrant a recommendation that a grand jury be convened to investigate the matter. A recommendation to that effect was transmitted to the Department of Justice by the IRS. After study by the Tax Division of the Department of Justice, the United States Attorney was authorized to present the matter to a grand jury. IRS Agents Rogers and Wordell were detailed to assist the United States Attorney and the grand jury in the resulting investigation. The agents were instructed by the responsible Assistant United States Attorneys not to employ any information gained in that process for any purpose other than assisting in the grand jury investigation (C.R. 160-161, 163, 219-220; "C.R." denotes the district court clerk's compiled record on appeal).

In April 1978, the grand jury indicted respondents along with other persons on two counts of conspiracy to defraud the United States (18 U.S.C. 371) and nine counts of tax fraud (26 U.S.C. 7206(2)) (Pet. App. 2a). The indictments described a scheme under which Sells made and concealed false entries on the books of Sells Engineering. Sells and Witte then used other corporations they controlled to submit fictitious invoices to Sells Engineering, Inc., which Sells and Witte represented to be genuine. The purpose of the conspiracy was to conceal use of corporate funds for personal purposes and to overcharge the United States under the defense contracts (C.R. 99-100, 497-504).

Sells and Witte each moved to dismiss the indictments, alleging various defects in the grand jury process pertaining primarily to the manner in which evidence was alleged to have been presented or withheld from that body. They also sought wide-ranging discovery into grand jury proceedings. Finally, respondents claimed that because subpoenas issued by the grand jury sought the very information covered by outstanding IRS administrative summonses, the issuance of the subpoenas was designed to evade a stay pending appeal of a district court order enforcing the IRS administrative summonses, and that this practice constituted "corruption of the Grand Jury process as a means of obtaining evidence for a mixed criminal and civil purpose [that] flaunts [*sic*] the policy of the law and is an abuse of the Grand Jury" (C.R. 49).[2]

In response to respondents' contentions, the government reviewed the course of the administrative investigation and the ensuing grand jury proceeding and denied all

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[2] This allegation was a variation on charges raised by respondents in separate litigation arising from the IRS's administrative investigation of them (see page 2 note 1, *supra*) and in respondent Witte's appeal from an order of the district court finding him to be a recalcitrant witness in the grand jury proceedings, within the meaning of 28 U.S.C. 1826(a). This litigation is described in our Reply to the Brief in Opposition to our petition at pages 2-6.

claims that the relationship between the two was in any respect improper (see C.R. 93-129). The Assistant United States Attorney who assisted the initial stages of the grand jury investigation filed an affidavit affirming that (C.R. 183):

> At no time was the grand jury used to obtain documents in furtherance of a civil investigation. At all times the sole purpose of resorting to the grand jury process was to determine the existence of potential criminal liability on the part of the subjects of the investigation.

A different Assistant United States Attorney who assisted the final stages of the grand jury investigation similarly affirmed that he had "not used the grand jury process to obtain evidence for use in civil or administrative investigations or litigation" (C.R. 328).

In December 1978, pursuant to a plea bargain, Sells and Witte pleaded guilty to one count of conspiracy to defraud the United States (Pet. App. 2a-3a). As part of this plea bargain the other counts of the indictment against Sells and Witte, as well as all counts against Sells Engineering, were dismissed.

2. Shortly before Sells and Witte entered their guilty pleas, the United States Department of Justice sought an order under Fed. R. Crim. P. 6(e) from the district court in which the criminal charges were pending that would authorize disclosure of grand jury transcripts and documents considered by the grand jury to attorneys serving in the Civil Division of the Department and to personnel assisting them. The Civil Division requested this disclosure in order to determine whether to file a civil suit under the False Claims Act (Rev. Stat. 3490 *et seq.* (1875 ed.)) against persons indicted by the grand jury. The Civil Division explained that it needed the material promptly because it feared that the six-year period provided by the statute of limitations might otherwise expire before it could determine whether a suit should be filed (Tr. of Dec. 7, 1978 at 6, 26).

One week later, the district court accepted the guilty pleas from Sells and Witte (Tr. of Dec. 15, 1978 at 40-59), who also withdrew their allegation of grand jury abuse (*id.* at 40, 60).[3] Several days thereafter, the district court held a hearing on the Civil Division's request for access to grand jury transcripts and documents. The government claimed access for Civil Division attorneys engaged in the False Claims Act investigation as of right under Fed. R. Crim. P. 6(e)(3)(A)(i), noting that under the Rule no court order was necessary for such disclosure (C.R. 437, 438), and sought disclosure to personnel assisting the Civil Division attorneys under Rule 6(e)(3)(C)(i) (Tr. of Dec. 18, 1978 at 77-79). Government counsel specified that the disclosure request covered all materials that had been before the grand jury investigating respondents (*id.* at 77). Respondent opposed disclosure of the grand jury materials, arguing that a Civil Division attorney is not an "attorney for the government" entitled to disclosure of such materials as of right and that the government had not made an adequate showing of need to justify disclosure (Tr. of Dec. 18, 1978 at 67). Respondents also sought to revive the claim of grand jury abuse abandoned in the criminal case (*id.* at 67-68, 71-75). In reply the government noted that respondents' motions to dismiss the indictment, containing the allegation of abuse, had been withdrawn and that, in any event, the government's opposition to the withdrawn motions (C.R. 93-330) fully dispelled any suggestion of impropriety (Tr. of Dec. 18, 1978 at 78-79).

The district court granted the government's request for disclosure (Pet. App. 22a-26a). Relying on the Fifth Circuit's decision in *In re Grand Jury (LTV)*, 583 F.2d 128 (1978), the court held (Pet. App. 22a) that Civil Division attorneys are "attorney[s] for the government" entitled to review grand jury materials relevant to their

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[3] The grand jury had also indicted two other individuals, Robert Tucker and Richard Teerlink. Tucker was ultimately convicted after trial and Teerlink pleaded guilty.

duties pursuant to Rule 6(e)(3)(A)(i).[4] The district court held in addition that the government had shown what it characterized as a "particularized need" sufficient to justify the requested disclosure, in that it had "demonstrated that the grand jury materials are rationally related to civil matters within the duty of the attorney for the government and that he requires the assistance of non-lawyers" (Pet. App. 23a). The court concluded that it was not required to rule upon the allegations of grand jury abuse made by respondents because they had been withdrawn when Sells and Witte pleaded guilty (*id.* at 24a). The court stated, however, that it "would have ruled there was no abuse of the grand jury process" (*ibid.*). The court accordingly authorized disclosure to Justice Department attorneys and assisting personnel and denied respondents' motion to stay disclosure (Tr. of Dec. 18, 1978 at 82-83).

Respondents secured an interim stay of disclosure through January 15, 1979, from a single circuit judge. They then appealed the district court's order to the Ninth Circuit. On February 27, 1979, a panel of two circuit judges vacated the earlier stay order and refused any further stay. Following this order, Civil Division attorneys and assisting personnel gained access to the grand jury materials through the United States Attorney's office. On September 17, 1979, the Department of Justice filed a civil suit in the United States District Court for the Southern District of California (*United States* v. *Peter A. Sells, et al.*, Civ. No. 79-1282-GT) against respondents and others under the False Claims Act and at common law, seeking recovery of amounts they had overcharged the United States on their contracts.

3. On April 2, 1981, after Civil Division personnel had had access to the grand jury materials for more than

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[4] The district court cited Rule 6(e)(2)(A)(i) (Pet. App. 22a), the designation for the pertinent provision prior to renumbering occasioned by a 1979 amendment to the rule. See page 21 note 16, *infra*.

two years, a divided panel of the court of appeals reversed the district court's disclosure order (Pet. App. 1a-19a).[5] Although the court of appeals recognized that the Fifth Circuit and several district courts had ruled otherwise, it held that grand jury materials could not be disclosed to Civil Division attorneys in the absence of a court order entered under Fed. R. Crim. P. 6(e)(3)(C)(i) (Pet. App. 9a-14a). The court based this holding on its view that such extra-judicial disclosure "might irresistibly encourage use of the grand jury as a tool of civil discovery" (*id.* at 12a) and on its analysis of the history of Rule 6(e), which (the court believed) showed that disclosure to government attorneys under Rule 6(e)(3)(A)(i) was limited to attorneys engaged in criminal prosecution (Pet. App. 10a-12a).

The court of appeals further held (Pet. App. 14a-17a) that, in order to secure access to grand jury materials by leave of court directed preliminarily to a judicial proceeding under Rule 6(e)(3)(C)(i), both Justice Department civil attorneys and personnel assisting them are required to demonstrate "particularized and compelling need" (Pet. App. 14a). Because the district court had employed a "rational relationship" standard to determine whether disclosure should be granted, the court of appeals

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[5] In the court of appeals, the government argued that the disclosure order was not an appealable final order (Br. 5-8). The government also argued that insofar as respondents sought to preclude Civil Division attorneys' access to the grand jury materials, their claim had become moot, and that insofar as respondents sought to bar use of those materials, their claim could only be addressed in the pending civil case (Br. 8-11). The court of appeals held, however, that, in the circumstances of this case, the disclosure order was appealable under 28 U.S.C. 1291 (Pet. App. 5a-6a); that, notwithstanding Civil Division personnel's two years of access to the materials at issue, the case was not moot because of the possibility of continued access to the materials and of disclosure to additional individuals that was created by the existing disclosure order (*id.* at 6a-7a); and that the challenge to disclosure was ripe and could properly be pressed in this proceeding rather than in the government's civil action (*id.* at 7a).

remanded the case for reconsideration of the disclosure order (*id.* at 16a-17a, 18a).[6]

Finally, although recognizing that the legislative history of congressionally enacted amendments to Rule 6(e) indicates that any hearing upon a government disclosure request should be conducted ex parte so as to preserve grand jury secrecy, the court of appeals prescribed an adversary hearing on remand to allow respondents' attorneys to object to the government's request, to the extent that the particular grand jury materials involved were documents belonging to respondents (Pet. App. 17a).[7]

District Judge Curtis, sitting by designation, dissented (Pet. App. 18a-19a). He concluded that the case was moot in light of Civil Division attorneys' two years of access to the grand jury materials, and he suggested that any objection to the government's use of the disputed materials could be entertained upon an appropriate motion in the pending civil action.[8]

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[6] The court of appeals added that "[a]ny grand jury abuse that has occurred is relevant to the district court's decision whether to disclose, and the court should consider [respondents'] allegations of such abuse" (Pet. App. 17a; citations omitted).

[7] The court of appeals also directed the district court to consider whether respondents' counsel were entitled to be heard in opposition to disclosure of other documents with which respondents were already familiar (Pet. App. 17a-18a). Although we believe that the court of appeals' requirement of adversary hearings on a Rule 6(e) motion is erroneous (see Pet. 21-22 n.12), we have not raised that issue in the petition.

[8] On June 5, 1980, while this case was pending before the court of appeals, the United States filed a second motion pursuant to Fed. R. Crim. P. 6(e)(3)(C)(i) seeking authority to disclose documents considered by the grand jury, and grand jury transcripts, to the IRS, to enable it to conduct an income tax audit of respondents and several affiliated taxpayers. In opposing this application, the taxpayers (respondents Sells and Witte, and Robert Tucker) repeated their allegations of grand jury abuse based upon the participation of IRS personnel in the grand jury investigation, again relying upon the motion filed but later withdrawn in the criminal

SUMMARY OF ARGUMENT

I

A. The decision of the court of appeals restricting disclosure of grand jury materials to Department of Justice attorneys engaged in criminal prosecution is contrary to the plain language of the Federal Rules of Criminal Procedure. Rule 6(e)(3)(A)(i) authorizes disclosure to "an attorney for the government for use in the performance of such attorney's duty," and Rule 54(c) defines "attorney for the government" to include any "authorized assistant of the Attorney General"—a category that includes attorneys in the Civil Division, just as it does their counterparts in the Criminal Division and the United States Attorneys' Offices. Significantly, unlike other exceptions to the rule of grand jury secrecy, Rule 6(e)(3)(A)(i) does not limit access to persons engaged in criminal law enforcement. No such restriction should be read into the rule.

B. This Court recognized the propriety of civil use of grand jury materials in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 683-684 (1958). The government argued in that case that use of existing grand jury materials in civil litigation brought by the United States was an integral part of the Attorney General's responsibility for civil law enforcement, while the appellees

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case (see pages 3-5, *supra*). The district court found that no grand jury abuse had occurred, noting, *inter alia*, that the grand jury proceedings had produced indictments against respondents, culminating in convictions. *In re Grand Jury Investigation*, Grand Jury No. 78-184, Tr. of June 23, 1980 at 3-4. The court found the applicable standard for disclosure to be satisfied (*id.* at 23) and granted disclosure, albeit on more restrictive terms than those the IRS had sought (*id.* at 24-28). The taxpayers appealed. *Sells* v. *United States*, No. 80-5829 (9th Cir.) ("*Sells II*"). The appeal was argued on March 3, 1982, and awaits decision. On July 16, 1982, the court of appeals withdrew *Sells II* from submission pending this Court's decision herein. The *Sells II* litigation is described in greater detail in our Reply to the Brief in Opposition to our petition at pages 7-8.

claimed that such use was inherently abusive. In rejecting appellees' contentions, the Court sanctioned the government's practice of employing grand jury materials to prepare for relevant civil litigation without seeking prior judicial authorization. The Court's decision in *Procter & Gamble* nowhere suggests that this rule is dependent upon the identity of the particular government attorneys involved—*i.e.*, whether the government attorneys handling the civil suit also conducted the grand jury proceedings.

C. The legislative and administrative history of Rule 6(e) does not support the decision below. The Advisory Committee Notes accompanying Rule 6(e) as originally adopted reflect the drafters' intention to continue prevailing practices respecting disclosure of grand jury materials. There is no evidence that disclosure of such materials was limited to government attorneys engaged in criminal litigation in 1946. Indeed, no attention was paid to the civil/criminal distinction at that time, no doubt because the common pattern was for the same attorney or group of attorneys to handle related civil and criminal litigation for the government. But the law was clear in 1946, as it has been since the founding of the Department of Justice, and remains today, that the Attorney General has complete authority to allocate responsibility among his assistants without creating arbitrary barriers among those handling civil, criminal, or grand jury matters. Accordingly, there is no reason to believe that, contrary to the plain language of Rule 6(e), its provisions were intended to create such an artificial barrier.

The legislative history of the 1977 amendment to Rule 6(e) also reflects approval of the prevailing practice of disclosure of grand jury materials to Department of Justice attorneys engaged in civil litigation, without prior judicial authorization. The 1977 amendment was designed to resolve existing uncertainty as to whether, and upon what terms, non-attorney personnel (generally em-

ployees of agencies outside the Department of Justice) assisting Department of Justice prosecutors could have access to grand jury materials. The amendment authorizes such disclosure, but requires leave of court before any agency outside the Department of Justice may employ information disclosed in this manner to its personnel for purposes of agency litigation. No change was made in the practice of disclosing grand jury materials to government attorneys within the Department of Justice, for purposes of civil law enforcement.

D. The policies underlying grand jury secrecy do not support the court of appeals' restrictive interpretation of Rule 6(e). Unlike disclosure to the public generally or to private litigants, disclosure of grand jury materials to Department of Justice attorneys creates no basis for concern that potential defendants will be alerted and flee, or will importune or threaten witnesses or grand jurors. Nor will such limited additional disclosure within the government impugn the reputations of those wrongly accused. This is especially so where, as here, the grand jury proceedings were concluded before any civil disclosure was sought.

On the other hand, availability of grand jury materials to Department of Justice attorneys engaged in civil litigation advances important public interests. Most important, of course, is the strong public interest in assuring enforcement of the civil law, especially in areas involving criminal or quasi-criminal conduct injurious to society as a whole, such as fraud upon the public fisc, bribery of officials, conflict of interest, and restraint of trade. The erection of artificial barriers between civil law enforcement and criminal prosecution is particularly inappropriate in such contexts, where the civil proscriptions form part of an integrated legislative scheme including criminal penalties. The civil provision of the False Claims Act, Rev. Stat. 3490 (1875 ed.), for example, simply establishes a monetary remedy for the government whenever criminal conduct as defined in Rev. Stat. 5438 (1875 ed.) has occurred.

Congress could not have intended the practical consequences of the court of appeals' decision. The court's construction of Rule 6(e) requires abandonment of a key mechanism used by Civil Division attorneys to carry out their duty to enforce the False Claims Act and similar prohibitions—systematic referrals from the FBI, the United States Attorneys and the Criminal Division containing information derived from grand jury proceedings that indicates a possible need for civil enforcement. In place of this mechanism, the Civil Division would often be forced to duplicate investigations already carried out by the grand jury at public expense.

II

The court of appeals erred in concluding that the United States must meet a standard of "particularized and compelling need" in order to obtain judicial authorization to disclose grand jury materials to Department of Justice attorneys, as well as to personnel assisting them, for use in civil law enforcement. The applicable provision, Fed. R. Crim. P. 6(e)(3)(C)(i), establishes no such standard. To be sure, this Court has held, in a case involving disclosure of grand jury materials to a private party, that disclosure should be authorized only when the private interest in disclosure outweighs the public interest in secrecy. *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 222-223 (1979). But the Court's opinion reflects that that rule was intended to govern only in the context of disclosure to a private party. The standards applicable to disclosure to government personnel is far different, because the interest in disclosure is public rather than parochial.

Even if *Douglas Oil* were controlling here, the court of appeals' decision incorrectly balances the relevant concerns. This Court did not sanction a rigid standard of "particularized and compelling need" for all grand jury disclosures. On the contrary, the Court established a flexible standard that adjusts the burden imposed upon

the party urging disclosure in light of the force of the policy of grand jury secrecy in the setting of the particular case. But, as we explain in Point I, the considerations that underlie grand jury secrecy have little application in this setting or in the typical case of disclosure to government attorneys and their assistants for civil litigation. In that context, a showing that the materials to be disclosed are relevant to matters within the duties of the attorneys for the government and that the requested assistance is reasonably necessary to the fulfillment of those duties is plainly adequate to accommodate the competing interests.

ARGUMENT

This case presents two important questions concerning Rule 6(e) of the Federal Rules of Criminal Procedure, which governs disclosure of grand jury materials. The court of appeals has held that disclosure of grand jury materials to Department of Justice attorneys responsible for civil litigation requires judicial authorization and that disclosure to such attorneys, as well as to personnel assisting them, may be approved only upon satisfaction of an exacting standard heretofore applied to disclosure applications by private litigants: a showing of "particularized and compelling need." The court of appeals' decision is contrary to the language and history of Rule 6(e) and will seriously disrupt the Department of Justice's efforts to fulfill its duty to enforce civil statutes, such as the False Claims Act and prohibitions against bribery, tax evasion and conflicts of interest, that have criminal law overtones. The combined effect of the two branches of the court of appeals' decision is to obstruct the government's civil use of grand jury materials even though secured without any abuse of the grand jury process; the decision accordingly cannot be reconciled with this Court's decision in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 683-684 (1958).

I. A DEPARTMENT OF JUSTICE CIVIL DIVISION ATTORNEY PREPARING A CIVIL FRAUD ACTION UNDER THE FALSE CLAIMS ACT IS "AN ATTORNEY FOR THE GOVERNMENT" ENGAGED IN "THE PERFORMANCE OF SUCH ATTORNEY'S DUTY," ENTITLED TO REVIEW PERTINENT GRAND JURY MATERIALS WITHOUT PRIOR JUDICIAL AUTHORIZATION

A. The Plain Language of Rule 6(e) Authorizes Department of Justice Attorneys to Review Grand Jury Materials As of Right

Rule 6(e) of the Federal Rules of Criminal Procedure establishes a general rule of secrecy respecting grand jury proceedings. Except as specifically authorized, the rule prohibits disclosure of "matters occurring before [a] grand jury" by anyone, other than a witness, who has a right of access to such proceedings. Fed. R. Crim. P. 6(e)(2). A knowing violation of this rule is punishable as a contempt of court. *Ibid.* Among the exceptions expressly established in the rule, however, is Fed. R. Crim. P. 6(e)(3)(A)(i), which authorizes disclosure of grand jury materials, other than records of actual deliberations and of voting by any grand juror, to "an attorney for the government for use in the performance of such attorney's duty."[9] For the purposes of the Federal Rules of Criminal Procedure, Rule 54(c) defines an "attorney for the government" to include "an authorized assistant of the Attorney General." By statute and regulation, attorneys assigned to the Civil Division of the United States Department of Justice, like attorneys elsewhere in the Department, are authorized assistants of the Attorney General. See 28 U.S.C. 510, 515-517, 519; 28 C.F.R. 0.13 and 0.45. The duties of such attorneys include prosecution of civil fraud actions under the False Claims Act. See 28 C.F.R. 0.45(d). Accordingly, as the Fifth Circuit

[9] We employ the term "grand jury materials" as a convenient shorthand for the label actually employed in the Rule: "matters occurring before the grand jury." See page 15 note 11, *infra*.

recognized in *In re Grand Jury (LTV)*, 583 F.2d 128, 130 (1978),[10] the plain language of Rule 6(e)(3)(A)(i) compels the conclusion that Civil Division attorneys were authorized to review the grand jury transcripts and documents sought in this case.[11]

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[10] Accord: *In re Grand Jury Proceedings, Misc. No. 80-56P*, 505 F. Supp. 978, 982 (D. Me. 1981); *United States* v. *General Electric Co.*, 209 F. Supp. 197, 198-202 (E.D. Pa. 1962); *In re Petroleum Industry Investigation*, 152 F. Supp. 646, 647 (E.D. Va. 1957); see also *Washington* v. *American Pipe & Construction Co.*, 41 F.R.D. 59, 62 (W.D. Wash 1966). But see *In re Grand Jury*, 82 F.R.D. 70, 73 (N.D. W. Va. 1979); and *Capitol Indemnity Corp.* v. *First Minnesota Construction Co.*, 405 F. Supp. 929 (D. Mass. 1975). The last case cited is distinguishable because the decision there rested upon the court's finding that disclosure would actually be to a government agency not covered by Rule 54(c) and would be made during the pendency of the grand jury proceeding. *Id.* at 932-934.

[11] For the purposes of this case we have not challenged the court of appeals' assumption that all of the items that Civil Division attorneys sought to review—including documents presented to the grand jury—are "matters occurring before the grand jury" subject to the general rule of secrecy established by Fed. R. Crim. P. 6(e)(2). We note, however, that there is substantial reason to question the accuracy of that assumption. See *In re Grand Jury Investigation*, 630 F.2d 996, 1000-1001 (3d Cir. 1980); *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1382-1383 (D.C. Cir. 1980); *United States* v. *Stanford*, 589 F.2d 285, 290-291 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960). Many of the documents sought in this case were government agency documents (see Tr. of Dec. 7, 1978 at 6; J.A. 43a). It is especially difficult to understand how such documents may be deemed grand jury materials. We note, as well, that the Judicial Conference's Advisory Committee on Criminal Rules has now withdrawn proposed amendments to Rule 6(e)(2) and 6(e)(3)(C), mentioned in our petition (Pet. 11 n.8), that would have affected the status of documents considered or subpoenaed by a grand jury. Pending this Court's decision in this case the Committee has also tabled consideration of the American Bar Association's proposal to amend Rule 6(e)(3)(A)(i), mentioned in our petition (Pet. 23 n.13), to bar all civil use of grand jury materials absent prior judicial authorization.

Significantly, Rule 6(e)(3)(A)(i) contains no language limiting access to or use of grand jury materials to attorneys for the government engaged in criminal prosecution duties. The absence of such language is especially striking because limiting language of this nature is incorporated in Rule 6(e)(3)(A)(ii), which authorizes disclosure of grand jury materials to government personnel outside the Department of Justice (and to non-attorney personnel within the Department of Justice) when such access is "deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce the criminal law." Plainly Congress [12] knew how to limit access to grand jury materials to persons engaged in criminal prosecutorial functions. See *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981). Moreover, persons who review grand jury materials pursuant to Rule 6(e)(3)(A)(ii) are expressly prohibited from "utiliz[ing] that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law." Fed. R. Crim. P. 6(e)(3)(B). No comparable restriction on use of grand jury materials by Department of Justice attorneys is contained in the rule. Accordingly, the rule on its face clearly authorizes disclosure, without judicial approval, to Department of Justice attorneys engaged in civil law enforcement.

B. This Court's Decisions Reflect Awareness and Approval of the Department of Justice's Practice of Making Grand Jury Materials Available to Attorneys Responsible for Relevant Civil Litigation Without a Court Order

The decision of the court of appeals not only disregards the clear implication of the statutory language, but

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[12] The pertinent provisions of Rule 6(e) in its present form are the product of legislative modification of rules prescribed by this Court pursuant to the Rules Enabling Act, 18 U.S.C. 3771. See pages 21-32, *infra*.

also cannot be reconciled with this Court's ruling in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958). There this Court reviewed the order of a district court granting disclosure of grand jury transcripts to the defendants in a civil antitrust case.[13] The civil suit was the outgrowth of a grand jury investigation that had terminated without the return of an indictment. The record made clear the government's assertion of the right to employ grand jury materials in civil litigation generally (*United States* v. *Procter & Gamble Co.*, 19 F.R.D. 247, 250 (D.N.J. 1956) (quoting statement of government counsel)):

> [T]he Government feels free, indeed obligated, to use information obtained from grand jury investigations in the preparation of civil actions which the Government is required to bring in its sovereign regulatory capacity * * *.

The district court granted the defendants' disclosure motion, holding that good cause for discovery had been established. In support of that conclusion the district court observed that the government was using the grand jury transcripts for preparation of the civil case, that the transcripts would be of significant assistance to the defendants, and that the transcripts were not otherwise available to the defendants. *United States* v. *Procter & Gamble Co.*, 19 F.R.D. 122, 123-128 (D.N.J. 1956).

Appellee Association of American Soap & Glycerine Producers, Inc., asserted in this Court (Br. 19-34) that the government's retention and use of the grand jury transcripts in civil litigation violated the rule of grand jury secrecy and that disclosure to the defendants should accordingly be permitted. The government defended the

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[13] Defendants sought disclosure pursuant to the civil discovery rules, and in one instance, pursuant to Rule 6(e), Fed. R. Crim. P., in a pending civil action. The district court directed the government to produce the grand jury transcripts for inspection and copying and dismissed the government's complaint when the government declined to comply.

practice of using grand jury materials to prepare a civil case where the grand jury was convened for a proper purpose (Br. 50-52), explaining that "the Attorney General should not be deprived of the right to use evidence properly and lawfully secured, in carrying out his statutory" duty under the Sherman Act (Br. 50). This Court reversed the disclosure order, holding that the policy of grand jury secrecy was not overcome by the considerations marshalled by the district court and the appellees in support of disclosure, because there had been no showing of "compelling necessity" and "particularized need." 356 U.S. at 681-683. By contrast, the Court approved the government's use of the grand jury materials, lawfully compiled, for purposes of civil law enforcement (*id.* at 683-684):

> [The district court] seemed to have been influenced by the fact that the prosecution was using criminal procedures to elicit evidence in a civil case. If the prosecution were using that device, it would be flouting the policy of the law. For these Sherman Act cases Congress has guarded against *in camera* proceedings by providing that "the taking of depositions . . . shall be open to the public" and that no order excluding the public shall be valid. 37 Stat. 731, 15 U.S.C. § 30.
>
> We cannot condemn the Government for any such practice in this case. There is no finding that the grand jury proceeding was used as a short cut to goals otherwise barred or more difficult to reach. It is true that no indictment was returned in the present case. But that is no reflection on the integrity of the prosecution. For all we know, the trails that looked fresh at the start faded along the way. What seemed at the beginning to be a case with a criminal cast apparently took on a different character as the events and transactions were disclosed. The fact that a criminal case failed does not mean that the evidence obtained could not be used in a civil case. It is only when the criminal procedure is subverted that

> "good cause" for *wholesale* discovery and production of a grand jury transcript would be warranted. No such showing was made here.

Procter & Gamble strongly suggests that the court of appeals erred in restricting the government's access to the grand jury materials in this case. To be sure, neither the appellees' argument nor the Court's holding in *Procter & Gamble* respecting the government's use of the grand jury transcripts was couched explicitly in terms of Rule 6(e), but the Court recognized that Rule 6(e) is merely declaratory of the pre-existing policy of grand jury secrecy (356 U.S. at 681 & n.5; see also *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399 (1959)), which the government's practice was held not to offend. Given the Court's recognition of the role of Rule 6(e) and its rejection of appellees' contention that the government had violated the rule of grand jury secrecy, *Procter & Gamble* must fairly be interpreted to approve civil use of grand jury materials by government attorneys as consistent with Rule 6(e). Moreover, the Court was plainly aware that the government had reviewed the grand jury transcripts without the benefit of any prior judicial authorization (see 356 U.S. at 684-685 (Whittaker, J., concurring); see also *Pittsburgh Plate Glass Co.* v. *United States*, *supra*, 360 U.S. at 404 (Brennan, J., dissenting)) and equally clearly approved that practice.[14]

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[14] Justice Whittaker, concurring in *Procter & Gamble*, joined the Court's judgment reversing the district court's discovery order, but wrote separately to call for equalization of the terms of access to grand jury materials for civil use between the government and private litigants. He stated (356 U.S. at 685):

> I would adopt a rule requiring that the grand jury minutes and transcripts and all copies thereof and memoranda made therefrom, in cases where a "no true bill" has been voted, be promptly upon return sealed and impounded with the clerk of the court, subject to inspection by any party to such a civil suit only upon order of the court made, after notice and hearing, upon a showing of such exceptional and particularized need as

Strictly speaking, of course, *Procter & Gamble* only addressed the civil use of grand jury materials by the government, and not the theoretically separate question whether disclosure may be made to individual government attorneys not privy to the materials as a result of the grand jury investigation or criminal prosecution. No viable distinction may be fashioned along these lines, however. Neither the Court's opinion nor the contentions of the parties in any way turned upon the identity of the government attorneys engaged in the civil antitrust action. Indeed, it appears that the record does not even indicate whether disclosures to additional government attorneys were involved. In short, the Court had no basis for assuming that disclosure of grand jury materials to civil attorneys had not occurred.[15] And it would be a strange and pointless rule that made the availability of grand jury materials for civil use by the United States turn upon attorney assignment patterns or a chance event such as the departure of an individual attorney from government employment. See pages 21-23, *infra*. Accordingly, the fair implication of the Court's decision in *Procter & Gamble* is that, so long as the grand

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is necessary to establish "good cause," in the circumstances, under Rule 34.

Although Justice Whittaker added, "Surely such an order may still be made by the trial court in this case" (*ibid.*), his view was plainly rejected by the majority, and he appeared to recognize that adoption of his view would represent a change in the law. Justice Whittaker's view also was not shared by the dissenting Justices, who would have granted discovery to the defendants rather than denying use of the grand jury materials to the government. 356 U.S. at 689-690 (Harlan, J., dissenting). We note, as well, that even under the rule proposed by Justice Whittaker, disclosure to government attorneys apparently would be permissible in the circumstances of this case, for the respondents were, in fact, indicted; indeed, the individual respondents were convicted.

[15] The issue of disclosure to additional attorneys was squarely presented by *In re Petroleum Industry Investigation*, *supra*, 152 F. Supp. at 646, upon which the government relied (see Br. at 51-52) in *Procter & Gamble*.

jury was utilized for proper criminal law enforcement purposes, disclosure of the material generated during the grand jury proceedings to government attorneys responsible for relevant civil litigation does not offend Rule 6(e).

C. Nothing in the Legislative or Administrative History of Rule 6(e) Restricts the Availability of Grand Jury Materials to Government Attorneys Engaged in Criminal Prosecution

Notwithstanding the plain language of Rule 6(e)(3)(A)(i) and the decision in *Procter & Gamble*, the court of appeals construed the rule as limiting disclosure to "attorneys for the government" engaged in criminal prosecution (Pet. App. 13a). In support of its interpretation, the court below cited (*id.* at 11a) the Advisory Committee Notes accompanying Rule 6(e) as first promulgated in 1946, similar notes accompanying an amendment to the rule proposed in 1976, and the legislative history of amendments to Rule 6(e) enacted by Congress in 1977. These materials do not support the court of appeals' restrictive interpretation of Rule 6(e)(3)(A)(i).

1. The Advisory Committee Notes accompanying Rule 6(e) as originally promulgated indicate the drafters' intention to continue traditional practices respecting disclosure of grand jury materials. 18 U.S.C. App. at 1411.[16] We are unaware of any evidence, however, that practices employed prior to 1946 restricted disclosure of grand jury materials to government attorneys engaged in criminal prosecution. Any such rule would be at odds with patterns of organiaztion that have prevailed in the Department of Justice and the Offices of the United States Attorneys since the earliest days of this Nation. Today,

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[16] The text of Rule 6(e) as promulgated in 1946 is reproduced in the appendix to this brief (page 3a, *infra*). Technical changes were made in Rule 6(e) in 1966. Substantive changes were made in the rule in 1977, as described at pages 25-32, *infra*. The present Rule 6(e)(1), not material here, was inserted in 1979, resulting in renumbering of the succeeding sections.

as in the past, several units of the Department and all of the United States Attorneys Offices have both civil and criminal law enforcement responsibilities, including authority to conduct grand jury proceedings.[17] And it has never been understood that the availability of grand jury materials for civil use turns upon assignment of the civil and criminal aspects of a given matter to the same attorney. Since the enactment of the Judiciary Act of 1789, ch. 20, Section 35, 1 Stat. 92, both civil and criminal litigation responsibilities have been vested without distinction in the person of the Attorney General and the several United States Attorneys. See 28 U.S.C. 515(a), 518, 519, 547. The authority of the Attorney General to assign responsibility for litigation to his assistants without respecting any arbitrary division among civil, criminal, and grand jury matters has long been confirmed by statute. See, *e.g.*, Rev. Stat. 359, 360 (1875 ed.); 5 U.S.C. (1940 ed.) 310; 28 U.S.C. 510, 515(a), 517, 518(b).[18] 28 U.S.C. 515(a), like its predecessor, 5 U.S.C. (1940 ed.) 310, is derived from the Act of June 30, 1906, ch. 3935, 34 Stat. 816, and provides:

> The Attorney General or any other officer of the Department of Justice, or any attorney specially ap-

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[17] See, *e.g.*, 28 C.F.R. 0.40(a) (criminal and grand jury jurisdiction of Antitrust Division); 28 C.F.R. 0.50(a) (criminal jurisdiction of Civil Rights Division); 28 C.F.R. 0.55(c), (d), (f)-(i), (n), (s) (civil jurisdiction of Criminal Division); 28 C.F.R. 0.65(d)-(g), (i) (criminal jurisdiction of Land and Natural Resources Division); 28 C.F.R. 0.70(b) (criminal jurisdiction of Tax Division).

[18] Rev. Stat. 359 (1875 ed.) provided in pertinent part:

> [T]he Attorney-General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested or may direct the Solicitor General or any officer of the Department of Justice to do so.

This provision is in effect today as 28 U.S.C. 518(b). Rev. Stat. 360 (1875 ed.) provided:

> The Attorney-General may require any solicitor or officer of the Department of Justice to perform any duty required of the Department or any officer thereof.

> pointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings * * * which United States Attorneys are authorized by law to conduct * * *.

Given the unqualified discretion of the Attorney General and the United States Attorneys to assign responsibility for civil litigation, criminal prosecution and grand jury matters in any manner deemed to suit the interests of the United States, there is no reason to believe that, by authorizing disclosure of grand jury materials to "the attorneys for the government for use in the performance of their duties" (see App. 3a, *infra*), the drafters of Rule 6(e) intended in 1946 to create a new distinction by limiting disclosure to attorneys engaged in criminal prosecution duties.

To be sure, as the court of appeals observed (Pet. App. 10a), the 1946 Advisory Committee Note also states (18 U.S.C. App. at 1411) that

> Government attorneys are entitled to disclosure of grand jury proceedings * * * inasmuch as they may be present in the grand jury room during the presentation of evidence.

This comment does not reflect an intent to restrict disclosure to those actually engaged in criminal prosecution duties, or to those actually present in the grand jury room. Plainly, there would be no point in authorizing disclosure to persons already privy to the grand jury materials. And it is established that grand jury materials may be disclosed to officials within the Department of Justice with supervisory authority over the conduct of the grand jury proceedings. *United States* v. *United States District Court*, 238 F.2d 713, 721 (4th Cir. 1956), cert. denied *sub nom. Valley Bell Dairy Co.* v. *United States*, 352 U.S. 981 (1957). Accordingly, the explanatory comment simply reflects the rule that the class of attor-

neys entitled to review grand jury materials is identical to the class of attorneys that could be authorized by the Attorney General to be present in the grand jury room during the presentation of evidence. As explained above, the Attorney General may authorize any Department of Justice attorney to conduct grand jury proceedings, without regard to the nature of his or her other duties.[19] Given the practice of assigning criminal and civil litigation arising from a common factual nexus to a single attorney or group of attorneys, a practice that we believe was more common in 1946 than it is today,[20] the Advisory

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[19] We do not suggest that an attorney with no responsibility for assisting the grand jury may be present in the grand jury room during the presentation of evidence. Fed. R. Crim. P. 6(d) may preclude that practice. The Attorney General's discretion to assign the civil and criminal aspects of a given matter to different attorneys would not warrant the presence in the grand jury room of an attorney interested solely in the civil matter. But that authority is a sufficient basis for extending disclosure of grand jury materials to such an attorney under Rule 6(e), for Rule 6(e) necessarily contemplates access by government attorneys who are not actually assisting the grand jury. For instance, we assume that Rule 6(d) would preclude the presence in the grand jury room of an attorney who is not assisting the grand jury, even though that attorney may subsequently assume a role in a resulting criminal prosecution. Disclosure to such an attorney would clearly be permitted under Rule 6(e) should that possibility become reality. Rules 6(e) and 6(d) are accordingly not congruent in this respect. The legislative history of the 1977 amendments to Rule 6(e) reveals that Rule 6(e) is intended to authorize disclosure to some persons not entitled to be present in the grand jury room. *Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 39-41 (testimony of Hon. Edward R. Becker, United States District Judge), 89-90 (testimony of Prof. Wayne LaFave, Reporter, Advisory Committee on Criminal Rules) (1977).

[20] Section 35 of the Judiciary Act of 1789 established an extremely decentralized pattern of responsibility for government litigation. See 1 Stat. 92. Because communication, and particularly

Committee simply had no occasion to comment upon the disclosure of grand jury materials to government attorneys responsible solely for the civil aspect of the matter investigated by the grand jury. The Advisory Committee Note accordingly does not suggest that the Attorney General's exercise of his discretion to assign the civil and criminal aspects of an investigation to different attorneys or functional units within the Department should limit the availability of grand jury materials to the government for use in civil litigation.

2. The court of appeals' reliance (Pet. App. 10a-11a, 13a) upon the 1976 Advisory Committee Note and the legislative history of the 1977 amendment to Rule 6(e) is equally unavailing. Attention at that time was focused on a problem distinct from the question in this case: the terms upon which grand jury materials might be disclosed to technical experts and other non-lawyers, particularly persons outside the Department of Justice, whose assistance was required by prosecuting attorneys. A second issue under debate was the question whether and on what terms agencies outside the Department of Justice whose personnel had assisted the grand jury could employ the information made available to the grand jury

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transportation, were much slower in 1946 (and before) than today, the common practice then was for the United States Attorneys' Offices to handle all aspects of litigation, civil and criminal, arising out of a particular factual situation. And there commonly was no formal separation between attorneys engaged in civil and criminal practice. In the ensuing years the mushrooming volume of litigation and the enactment of complex civil legislation have required specialization among government attorneys and special attention to the maintenance of uniform policies nationwide. Thus, a far higher share of government litigation is today handled at least in part by Justice Department attorneys based in Washington, D.C., specializing in particular kinds of practice. Compare 28 C.F.R. Introduction at 2 (1938) (describing functions of the Claims Division, predecessor to the Civil Division) with 28 C.F.R. 0.45 (detailing functions of the present-day Civil Division).

agents for their own investigations and litigation.[21] The product of the 1977 amendment was a general reorganization of Rule 6, and the addition, *inter alia*, of the present Rule 6(e)(3)(A)(ii) and 6(e)(3)(B) (see Act of July 30, 1977, Pub. L. No. 95-78, 91 Stat. 319 *et seq.*). The present Rule 6(e)(3)(A)(i), however, was carried forward from the first sentence of the prior text (see App., *infra*, 3a) without substantive alteration. Although there was some passing reference to civil use of grand jury materials generally in the legislative hearings and reports, there is no indication that disclosure to Department of Justice attorneys with civil law enforcement responsibilities was to be precluded. Indeed, insofar as any inference can be drawn, it appears that Congress approved this practice.

The amendment to Rule 6(e) proposed by the Advisory Committee and transmitted by this Court to Congress would have provided for disclosure to government personnel assisting the government attorney by adding the following definition of the phrase "attorney for the government" as used in Rule 6(e):

> For purposes of this subdivision, "attorneys for the government" includes those enumerated in Rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties.

See 425 U.S. 1157, 1161. Although the drafters of the proposed Rule urged vigilance against abusive use of a grand jury for civil litigation ends, 18 U.S.C. App. (Supp. IV) at 611, there was no suggestion that the Rule would bar disclosure of grand jury materials already in existence to government attorneys for use in civil law enforcement. Indeed, the proposed incorporation of Rule 54(c) by reference highlights a contrary assumption. Moreover, in describing the availability of grand jury materials to the government under Rule 6(e) as it then stood, the Ad-

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[21] See H.R. Rep. No. 95-195, 95th Cong., 1st Sess. 3-5 (1977); S. Rep. No. 95-354, 95th Cong., 1st Sess. 5-8 (1977).

visory Committee relied upon the Third Circuit's decision in *In re Grand Jury Proceedings*, 309 F.2d 440, 443 (1962), quoting from language therein distinguishing between disclosure to attorneys for the government subject to the control of the Attorney General and attorneys employed by administrative agencies. The court concluded that the latter were not entitled to disclosure as "attorneys for the government," implying a contrary view as to the former. The Advisory Committee Note accordingly reflects approval of the existing disclosure practices of the Department of Justice.[22]

Upon transmission of the proposed Rules by this Court, Congress acted to postpone the effective date of the amendment to Rule 6(e) to permit more thorough study of the matter than the Rules Enabling Act would otherwise have allowed. Act of July 8, 1976, Pub. L. No. 94-349, 90 Stat. 822. The House of Representatives then conducted hearings concerning the proposed amendments to Rule 6(e) and other criminal rules. See *Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977) (hereinafter "*Hearings*"). A substantial diversity of viewpoints was expressed at the hearings. Most significant for present purposes, several key witnesses emphasized the propriety under existing law of civil use of grand jury materials by Department of Justice attorneys (as distinguished from agency attorneys) in the absence of a showing of grand jury abuse (see *Hearings*, *supra*, at 36, 45 (testimony of Hon. Edward R. Becker, United States District Judge);[23] 93-94

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[22] The Advisory Committee Note also cites this Court's *Procter & Gamble* decision, 18 U.S.C. App. (Supp. IV) at 611, and accordingly may be deemed to approve the result of that case.

[23] Judge Becker was invited to testify because of his authorship of two influential opinions respecting Rule 6(e), *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971), and *Robert Hawthorne, Inc.* v. *Director of Internal Revenue Service*, 406 F.

(testimony of Prof. Wayne LaFave, Reporter, Advisory Committee on Criminal Rules)) and remarked that under Rule 6(e) disclosure to attorneys for the government did not require judicial authorization (see *id.* at 55 (testimony of Richard L. Thornburgh, Acting Deputy Attorney General)).[24] Several witnesses opposed the amendment as written, fearing that disclosure to agency personnel assisting the grand jury would inevitably make grand jury materials available for agency use. A variety of modifications to the amendment were proposed as a means of preventing such leakage.[25] Finally, at least one witness suggested that no civil use of grand jury materials should be permitted.[26]

Supp. 1098 (E.D. Pa. 1976). The latter opinion reflects approval of civil use of grand jury materials by Department of Justice attorneys. *Id.* at 1119 n.35.

[24] Mr. Thornburgh's oral presentation also includes the statement that a "6(e) order is clearly required * * * where a criminal fraud investigation before a grand jury fails to produce enough legally admissible evidence to prove beyond a reasonable doubt that criminal fraud ensued." *Hearings, supra,* at 67. Read in context, however, this comment appears to refer to disclosure to agencies outside the Department of Justice. The statement was made in response to a question whether disclosure could be made to agency personnel for use by their agencies in conducting their own civil or criminal investigations. *Id.* at 66. Mr. Thornburgh's response was that any such disclosure for agency use would require judicial authorization (*id.* at 67):

> It would be the practice of the Department at that time to seek a 6(e) order from the court in order that that evidence could be made available for whatever civil consequences might ensue.

[25] See, *e.g., Hearings, supra,* at 28 (statement of Terry Philip Segal and Gerald Feffer); 34, 50 (testimony and statement of Judge Becker); 194-195 (testimony of Prof. Leon Friedman); 230 (statement of Prof. Melvin Lewis).

[26] See, *e.g., Hearings, supra,* at 20 (testimony of Terry Philip Segal); see also *id.* at 76 (statement of Rep. Symms); 111, 124 (testimony and statement of David Epstein).

The House Committee was unable to agree upon a satisfactory disposition of the amendment to Rule 6(e) and recommended deferring any substantive change in the Rule until a comprehensive grand jury reform bill, including an exhaustive revision and clarification of Rule 6(e), could be completed. H.R. Rep. No. 95-195, 95th Cong., 1st Sess. 4-5 (1977). The focus of the Committee's concern, however, was on disclosure to non-Department of Justice personnel; there was no suggestion of disapproval of prevailing practices involving Justice Department attorneys in the House Committee's Report. *Ibid.* Representative Wiggins dissented from the Committee's action on Rule 6(e). He reported the finding of the Committee's survey of United States Attorneys and the Department of Justice respecting existing disclosure practices (H.R. Rep. No. 95-195, *supra*, at 13):

> [T]here was general agreement that disclosures at least to criminal investigative agents and other divisions within the Justice Department were permissible without court order.

The Committee bill, H.R. 5864, 95th Cong., 1st Sess. (1977), deleting the amendment to Rule 6(e) promulgated by this Court, was passed by the House of Representatives. 123 Cong. Rec. 11111-11112 (1977).

The Senate, however, was not content to await further legislation. Instead, the Senate Committee amended the House bill, reorganizing the existing provisions of Rule 6(e) and inserting the provisions that became the present Rule 6(e)(3)(A)(ii) and 6(e)(3)(B). These provisions authorize disclosure without a court order to personnel whose assistance is needed by government attorneys for criminal prosecution purposes, but require judicial approval prior to use of such information by such personnel for any other purpose. Rather than disapproving the Advisory Committee proposal, the Senate Committee suggested that a need for clarification prompted its reformulation. See S. Rep. No. 95-354, 95th Cong., 1st Sess. 6-8 (1977). There is no indication whatever

that, in adding this clarification, Congress intended to end the prevailing practice allowing disclosure of grand jury materials to Department of Justice attorneys responsible for civil law enforcement. Rather, the Senate Committee Report expressly remarked (*id.* at 8):

> There is, however, no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes. On the contrary, there is no reason why such use is improper, assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation.[27]

Contrary to the court of appeals' statement (Pet. App. 13a), nothing in the Senate Committee Report "implies that a court order must be obtained" under Rule 6(e)(3)(C)(i) to authorize such disclosure. The court's assertion apparently rests upon language in the Committee Report, immediately following that quoted above (S. Rep. No. 95-354, *supra*, at 8; footnote omitted):

> Accordingly, the Committee believes and intends that the basis for a court's refusal to issue an order under * * * [Fed. R. Crim. P. 6(e)(3)] (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be no more restrictive than is the case today under prevailing court decisions.

This language, however, does not indicate that a court order under Rule 6(e)(3)(C) is required to disclose grand jury materials to Department of Justice attorneys with civil law enforcement responsibilities. Instead, the Committee's comments relate only to the standard to be

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[27] As noted above (see page 16), the Senate's failure to restrict disclosure pursuant to Rule 6(e)(3)(A)(i) to government attorneys engaged in "enforce[ment] of federal criminal law," or to preclude civil use by such attorneys, at the time it inserted similar restrictions applicable to persons other than government attorneys, is a telling indication that no such restriction was intended.

applied *when* an order under Rule 6(e)(3)(C) is required—for instance, when the government seeks to make disclosure to civil support personnel or to allow use of the materials in agency civil litigation.[28]

The House bill, as amended by the Senate Committee, passed the Senate without debate (123 Cong. Rec. 24641-24642 (1977)) and was referred back to the House of Representatives, which concurred in the Senate amendments. (*id.* at 25193-25196). The House consideration of the amended bill reveals that body's approval of disclosure of grand jury materials to Department of Justice attorneys for civil use. In presenting the Senate's amendments to the House, Representative Mann explained (*id.* at 25194) that Rule 6(e)(3)(A)(i) "is not intended to change any current practice." Of course, both the 1976 Advisory Committee Note transmitted to Congress and the House Committee hearings made clear that prevailing practices allowed disclosure to Department of Justice attorneys for civil use (see pages 26-27, *supra*). Moreover, Representative Wiggins, whose views had carried the day in the Senate (see page 29, *supra*), explained the prevailing practice, distinguishing between disclosure of

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[28] The "prevailing court decisions" cited by the Senate Committee (S. Rep. No. 95-354, *supra*, at 8 n.13) were this Court's *Procter & Gamble* decision and Judge Becker's opinion in *Robert Hawthorne, Inc.* v. *Director of Internal Revenue Service*, *supra* (see page 27 note 23, *supra*). The pages cited from *Procter & Gamble* reflect the standard established for disclosure upon motion to private parties, but primarily convey the Court's approval of the government's civil use of grand jury materials without a court order (see pages 16-21, *supra*). In *Robert Hawthorne, Inc.*, the district court held that agency use of grand jury materials pursuant to the language that became Rule 6(e)(3)(C)(i) required a court order (406 F. Supp. at 1129 n.62), but appears to have approved ultimate civil use by the Department of Justice without any such precondition. *Id.* at 1119 n.35. Judge Becker's testimony to the House Committee was to the same effect. See page 27, *supra*. Accordingly, the court of appeals' inference that the Senate Report disapproves of disclosure of grand jury materials to Department of Justice attorneys responsible for relevant civil litigation is entirely unfounded.

grand jury materials to Department of Justice attorneys for the purpose of civil use and disclosure to agencies outside the Department (123 Cong. Rec. 25196 (1977); emphasis added):

> There will come a time when a grand jury uncovers violations of civil laws, or State or local laws. It then becomes the duty of the attorney for the Government, *if he or some other attorney for the Government cannot act on that information*, to turn it over to the appropriate governmental agency so that such agency can do its duty. However, the attorney for the Government may do this only after successfully seeking an order of the court.

The history of Rule 6(e) accordingly leaves little room for doubt that Congress approved of disclosure of grand jury materials to Department of Justice attorneys responsible for relevant civil litigation, without court authorization.

D. Pertinent Policy Considerations Support a Literal Interpretation of Rule 6(e)(3)(A)(i)

The court of appeals rested its restrictive interpretation of Rule 6(e)(3)(A)(i) upon the general policy of grand jury secrecy and the belief that a contrary decision "might irresistibly encourage use of the grand jury as a tool of civil discovery" and would "severely limit court review of any such abuse" (Pet. App. 12a). These considerations do not support the court of appeals' decision. On the contrary, the pertinent policy considerations support disclosure to Civil Division attorneys.

1. The policies that undergird the traditional rule of grand jury secrecy were summarized in *United States* v. *Procter & Gamble Co.*, *supra*, 356 U.S. at 681-682 n.6 (quoting *United States* v. *Rose*, 215 F.2d 617, 628-629 (3d Cir. 1954)):

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and

> to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

These policies could in no event justify an interpretation of Rule 6(e)(3)(A)(i) that is contrary to the plain language of the Rule. But even if these policy factors are deemed relevant, they add little support to the court of appeals' ruling.

As the court of appeals itself recognized (Pet. App. 16a), most of the policies underlying grand jury secrecy are inapposite here. Where, as in this case, grand jury proceedings and the resulting criminal prosecution have been concluded,[29] there is no risk that disclosure will alert potential defendants who might escape, or importune or threaten witnesses or grand jurors. Nor is there need here for concern about the good name of those who are investigated but exonerated or about further disclosures that might make future grand jury witnesses hesitant to speak forthrightly. Disclosure of grand jury materials to Department of Justice attorneys does not make those materials public. Any further dissemination must be in conformity with the requirements of Rule 6(e), which are backed by the sanction of contempt. Fed. R. Crim. P. 6(e)(2). Civil Division attorneys, like their criminal law enforcement counterparts, are Department of Justice employees well aware of their professional and legal

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[29] This is the typical situation in which access to grand jury materials is sought for civil law enforcement purposes. See *Hearings*, *supra*, at 67 (testimony of Acting Deputy Attorney General Thornburgh).

obligations not to breach grand jury secrecy and have access to the same security arrangements as prosecutors to ensure that secrecy. Further dissemination of grand jury materials will occur only if, upon examination, they are found to warrant a civil action in the name of the United States. In that event, any residual force remaining to the policies of grand jury secrecy is outweighed by the interest of the United States in redressing violations of the law. See Fed. R. Crim. P. 6(e)(3)(C)(i) (permitting disclosure of grand jury materials "when so directed by a court preliminarily to or in connection with a judicial proceeding"); pages 41-47, *infra*. Accordingly, the policies that underlie the rule of grand jury secrecy do not compel any departure from the plain meaning of Rule 6(e)(3)(A)(i).

Contrary to the court of appeals' assumption, there is no evidence that Rule 6(e) was designed to prevent abuse of the grand jury. The Rule is, moreover, ill-suited to that task, for it places no direct limit upon civil *use* of grand jury materials.[30] As explained above (see pages 16-21), *United States* v. *Procter & Gamble Co.*, *supra*, 356 U.S. at 683-684, establishes at a minimum that attorneys who become privy to grand jury materials by assisting a properly-conducted grand jury may employ those materials for civil litigation purposes. Furthermore, nothing in Rule 6(e) prevents the Attorney General from assigning criminal and civil litigation responsibilities arising from a common nucleus of operative facts to a single attorney. Accordingly, if it were true, as the court of appeals supposed, that the temptation to abuse the grand jury process is irresistible and that there are no

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[30] Similarly, Rule 6(e) was not designed to protect, and does not provide any protection, against use of a grand jury to collect evidence for a pending criminal case. Allegations of abusive use of a grand jury may be considered upon a proper application in any civil or criminal proceeding that results. There is no need to press Rule 6(e) into this service.

other adequate safeguards against such abuse, one could only conclude that the court of appeals' interpretation of Rule 6(e) would foster grand jury abuse by *encouraging* such dual assignments. The practice of assigning responsibility for the civil aspects of criminal-related matters to different attorneys is, on the other hand, a substantial safeguard against the perceived risk that a grand jury may be employed to develop evidence for a civil case.

In any event, the district court found no grand jury abuse here (see Pet. App. 24a),[31] and there is no foundation whatever for the court of appeals' cavalier assumption that grand jury abuse is a recurring problem. Department of Justice attorneys are fully cognizant of their professional and legal obligations respecting use of the grand jury, and the reported decisions, repeatedly rejecting claims of grand jury misuse, demonstrate strict adherence to these obligations. Should the need arise, the district courts have sufficient tools to control abusive use of grand jury proceedings without perverting the meaning of Rule 6(e).[32]

2. Substantial practical and policy concerns support the disclosure of grand jury materials to Department of

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[31] Respondents' claims of grand jury abuse in this case are entirely insubstantial. First, the district court in *Sells I* and *Sells II* found these charges devoid of merit. Second, the fact that indictments were returned and convictions secured against respondents belies the claim of abuse. Indeed, the allegation of misconduct raised in the criminal case and alluded to here was merely that the grand jury investigation had a "mixed" civil and criminal purpose. See page 3 & note 2, *supra*. Finally, and perhaps most significantly, respondents have never alleged that the grand jury proceedings were initiated for the purpose of establishing civil liability under the False Claims Act, but have asserted that the improper purpose involved was the establishment of tax deficiencies.

[32] Contrary to the court of appeals' assumption (Pet. App. 7a), suppression would not necessarily be warranted even if abuse were demonstrated. This Court's decision in *Procter & Gamble* suggests that compensating disclosure to civil defendants may be the proper remedy, at least in some circumstances. 356 U.S. at 684. And no decision of this Court establishes an "exclusionary rule" as the remedy for grand jury abuse in a civil case. The question of a proper remedy for demonstrated abuse of a grand jury remains open for consideration in an ensuing civil action.

Justice attorneys engaged in pertinent civil litigation. Such disclosure serves the vital public interest in the enforcement of civil law proscriptions affecting criminal and quasi-criminal conduct. Enforcement of the False Claims Act and similar prohibitions respecting bribery and conflict of interest, like the civil enforcement of the antitrust laws, is as much a part of the duty of the sovereign as is the enforcement of the criminal law. See *In re Petroleum Industry Investigation*, 152 F. Supp. 646, 647 (E.D. Va. 1957).

Indeed, the distinction between "civil" and "criminal" law enforcement duties is quite artificial in this context, when the United States has commenced an investigation for the purposes of bringing suit in its sovereign capacity. True, the historic role of the grand jury is as a criminal law enforcement device, and it would therefore be improper to use it for civil investigative purposes. But once a grand jury investigation has been lawfully conducted and concluded, it is difficult to appreciate the justifications for a rule that would restrict access by other parts of the Justice Department to relevant materials generated by the grand jury. There is no reason why evidence that may warrant civil law enforcement, uncovered in the course of a proper grand jury investigation, should not be acted upon by the attorney for the government with responsibility, delegated by the Attorney General, for enforcing the civil laws.

This is especially true when Congress has enacted civil legislation that, together with related criminal law provisions, forms part of an integrated law enforcement scheme. The criminal penalties and injunctive provisions of the Sherman Act at issue in *Procter & Gamble* constitute part of such a scheme. The civil provisions of the False Claims Act, Rev. Stat. 3490 *et seq.* (1875 ed.), likewise were enacted as part of an integrated scheme of civil and criminal law enforcement. See *United States* v. *Bornstein*, 423 U.S. 303, 305-307 n.1 (1976); *United States* v. *Neifert-White Co.*, 390 U.S. 228, 228-229 n.1

(1968). The False Claims Act was adopted in 1863. Act of Mar. 2, 1863, ch. 67, Sections 1 and 3, 12 Stat. 696, 698. A single section of the Act, Section 3, prescribed both criminal and civil penalties.[33] It was re-enacted as Rev. Stat. 3490-3494 and 5438 (1875 ed.). Section 3490, which establishes civil liability, simply incorporates by reference the proscriptions contained in the criminal provision, Section 5438.[34] Although Rev. Stat. 5438 has been repealed and superseded by 18 U.S.C. 287 and 1001 (see *United States* v. *Bornstein*, *supra*, 423 U.S. at 307 n.1), it retains continued vitality insofar as it defines the acts giving rise to civil liability under Rev. Stat. 3490. 423 U.S. at 307 n.1.[35] Because Congress devised the civil pro-

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[33] Section 1 of the Act listed the forms of proscribed conduct, but applied only to military personnel. Section 3 of the Act, applicable to other persons, incorporated by reference the proscriptions enumerated in Section 1. Section 3 prescribed a civil forfeiture of $2,000 plus double damages as the civil remedy and established criminal penalties of imprisonment and fines. 12 Stat. 698.

[34] Section 3490 provides:

> Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'CRIMES,' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with costs of suit; and such forfeiture and damages shall be sued for in the same suit.

[35] A version of the civil provisions of the False Claims Act interpolating the substantive proscriptions of Rev. Stat. 5438 *in haec verba* into the text of Rev. Stat. 3490 is codified at 31 U.S.C. 231. Because Title 31 has not been enacted into positive law, however, the official text remains that of the Revised Statutes. *United States* v. *Bornstein*, *supra*, 423 U.S. at 305 n.1.

visions of the False Claims Act as an integral part of the criminal enforcement scheme, there can be little doubt that Congress expected that the attorney for the government would pursue either civil or criminal enforcement, or both, as appropriate.[36] In these circumstances, the court of appeals' erection of an arbitrary barrier to civil enforcement of the False Claims Act serves to frustrate the clear intent of Congress.

In order to fulfill the congressional mandate for diligent enforcement of the False Claims Act (see note 36, *supra*) and to protect the public fisc, the Attorney General has assigned primary responsibility for civil enforcement to a litigation unit possessing the requisite expertise within the Civil Division of the Department of Justice. See 28 C.F.R. 0.45(d). In carrying out this mission the Civil Division regularly receives referrals in these areas of responsibility from the FBI, the Criminal Division of the Justice Department and the United States Attorneys that contain grand jury materials and documents that have been considered by a grand jury. These materials are examined by the responsible Civil Division attorneys to determine whether further investigation leading to filing of a civil action is warranted. If an affirmative determination is made, the Civil Division may receive files from the originating office that often include additional grand jury materials. The decision below precludes con-

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[36] Rev. Stat. 3492 (1875 ed.) commands the United States Attorneys "to be diligent in inquiring into any violation" of Rev. Stat. 3490 and to proceed against offenders "for the recovery of such forfeiture and damages." The special importance assigned to such enforcement and the quasi-criminal aspect of the conduct proscribed is emphasized, as well, by the provision for civil arrest of alleged offenders (Rev. Stat. 3492), and by the inclusion of a *qui tam* provision, Rev. Stat. 3491 (1875 ed.), authorizing individuals to maintain False Claims Act suits in the name of the United States. See *United States* v. *Bornstein*, *supra*, 423 U.S. at 315 n.11.

tinuation of this referral system and will accordingly handicap the government's prosecution of civil actions arising out of criminal conduct. Meritorious claims may be abandoned for lack of sufficient information to frame a complaint before the statute of limitations expires. On the other hand, the decision below will encourage premature filing of suits that may not prove meritorious, so as to make civil discovery techniques available.

The court of appeals' decision will also compel the Civil Division or government investigatory personnel to duplicate investigative work performed in connection with a grand jury investigation. United States Attorneys and attorneys within the Department of Justice conducting grand jury proceedings routinely make use of the assistance of investigatory personnel from the FBI or, as in this case, the IRS. Government investigators, serving as agents of the grand jury, may expend substantial amounts of time in this capacity.[37] If Civil Division attorneys are not permitted to review the materials collected by these investigatory agents, they will be required to undertake a separate investigation employing personnel completely insulated from the grand jury proceedings to establish the factual basis for civil enforcement. See Fed. R. Crim. P. 6(e)(3)(B). There is no warrant for imposing this heavy burden upon the government, which (unlike a private party seeking disclosure) has already borne the cost of the initial investigation.

Attorneys engaged in False Claims Act enforcement report that a significant proportion of False Claims Act cases involve elaborate schemes to defraud the United States, such as the one conducted by respondents. The financial and practical burden of re-investigation would accordingly be particularly large. In some cases duplication of the investigation may be impossible because of the

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[37] For instance, the record in *Sells II* reflects that IRS personnel devoted approximately 20,000 man-hours to the grand jury investigation. Affidavit of Mark F. Rogers at ¶ 14 (June 5, 1980).

passage of time. These cases are often ones involving the largest financial stakes for the public. Criminal prosecution of the white collar crimes that are typically involved, moreover, often results in a plea bargain that averts the criminal trial that would otherwise place the relevant evidence in the public record. Thus, there is a special public interest in making relevant grand jury materials freely available to Justice Department attorneys responsible for protection of the public fisc.

The adverse impact of the court of appeals' decision, of course, is not limited to the Civil Division of the Department of Justice. The Antitrust, Tax, and Criminal Divisions of the Department also have occasion to employ grand jury materials in civil proceedings within the scope of their respective areas of responsibility. The same is true of the United States Attorneys' Offices. Unless the decision below is overturned, the Department of Justice may well be faced with the unpalatable alternatives of reorganization so as to assign the conduct of civil and criminal litigation arising out of a common nucleus of facts to a single attorney or group of attorneys, or curtailment of civil law enforcement activities.[38] These disloca-

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[38] To be sure, the adverse impact of the court of appeals' interpretation of Rule 6(e)(3)(A)(i) is substantially magnified by the Court's interpretation of Rule 6(e)(3)(C)(i) to require proof of a "particularized and compelling need," and would be somewhat mitigated should we prevail in our contentions respecting the latter point. As explained below (page 46), the combined effect of these rulings is especially damaging. But even if this Court were to disagree with the court of appeals' interpretation of Rule 6(e)(3)(C)(i), the injury to civil law enforcement worked by the requirement of judicial authorization for disclosure of grand jury materials is substantial. Unless Justice Department attorneys responsible for civil law enforcement are permitted access to grand jury materials, it will be difficult to satisfy any standard that might govern disclosure to attorneys and others subject to Rule 6(e)(3)(C)(i). The difficulty resulting from the court of appeals' decision arises in part from the specialization of functions within

tions would not be justified by any corresponding benefit in the nature of meaningful protection of grand jury secrecy.

II. DISCLOSURE OF GRAND JURY MATERIALS TO PERSONS ASSISTING DEPARTMENT OF JUSTICE ATTORNEYS IN CIVIL LITIGATION IS PRESUMPTIVELY PROPER

Rule 6(e)(3)(C)(i) provides authority for release of grand jury materials to persons other than attorneys for the government or personnel assisting such attorneys in enforcing criminal laws. It is applicable both to disclosures sought by private parties and to disclosures sought by government personnel or agencies that are not within the scope of Rule 6(e)(3)(A). The Rule permits otherwise prohibited disclosures "when so directed by a court preliminarily to or in connection with a judicial proceeding * * *." The Rule does not prescribe any standard, however, for the courts to apply in passing on applications falling within this authority. Nor do the Advisory Committee Notes accompanying Rule 6(e) as promulgated in 1946 address that issue.[39] In *Douglas*

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the Department of Justice. The Assistant United States Attorney or other government prosecutor handling the grand jury proceeding will rarely have the expertise necessary to make a refined judgment as to the appropriateness of civil enforcement. To require that the screening process be conducted by the criminal prosecutor would constrain the Attorney General's exercise of authority to assign responsibility for litigation among his assistants and would compel a substantial duplication of labor by government attorneys. This difficulty is also exacerbated by the possibility that the attorney responsible for the prosecution might no longer be with the government when civil disclosure is sought. In that event there might be no government attorney sufficiently familiar with the grand jury materials to file a motion for disclosure detailed enough to enable the court intelligently to review the application.

[39] Rule 6(e)(3)(C)(i) is derived from the second sentence of Rule 6(e) as originally promulgated (see App., *infra*, 3a).

Oil Co. v. *Petrol Stops Northwest*, 441 U.S. 211 (1979), following *United States* v. *Procter & Gamble*, *supra*, 356 U.S. at 682-683, the Court held that a private party seeking disclosure under Rule 6(e)(3)(C)(i) is required to show (441 U.S. at 222):

> that the material [sought] is needed to avoid a possible injustice in another proceeding, that the need for disclosure is greater than the need for continued secrecy and that the[] request is structured to cover only material so needed.

In this case, the government sought leave of court pursuant to Rule 6(e)(3)(C)(i) to disclose grand jury materials to expert personnel (including staff of the Defense Contract Audit Agency) whose assistance was required by Civil Division attorneys to enable them to analyze the materials, and if appropriate, to prepare a civil fraud action.[40] The court of appeals reversed the district court's order granting this motion because, the court believed, the district court had not applied a standard of "particularized and compelling need" (Pet. App. 14a). The court of appeals thus rejected the view of the two other courts of appeals that have addressed this issue, both of which, like the district court, deemed it sufficient for purposes of Rule 6(e)(3)(C)(i) to show that "the grand jury materials [sought] are rationally related to civil matters within the duty of an attorney for the government and that he requires assistance from the non-lawyers described." *In re Grand Jury (LTV)*, 583 F.2d 128, 131 (5th Cir. 1978); see also *In re Grand Jury Subpoenas, April, 1978, at Baltimore*, 581 F.2d 1103, 1110

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[40] Contrary to the court of appeals' assumption (Pet. App. 13a-14a), we believe that Rule 6(e)(3)(A)(i) contemplates disclosure to Department of Justice personnel whose contact with grand jury materials is limited to clerical and ministerial support for a government attorney, and that an application pursuant to Rule 6(e)(3)(C)(i) is not required for that purpose. Indeed, any other rule might make it impossible to file a motion under Rule 6(e)(3)(C)(i) without violating Rule 6(e) in the process.

(4th Cir. 1978), cert. denied *sub nom. Fairchild Industries, Inc.* v. *Harvey*, 440 U.S. 971 (1979). Because the court of appeals concluded that disclosure to Civil Division attorneys was not authorized by Rule 6(e)(3)(A)(i), it directed that the restrictive standard it enunciated be applied to government attorneys as well as to other government personnel. We have explained above why Rule 6(e)(3)(C)(i) has no application to Civil Division attorneys at all. In any event, we submit that the standard identified by the court of appeals cannot properly be applied to govern applications for disclosure to government attorneys or assisting personnel.

The court of appeals rested its determination that the government must show a "particularized and compelling need" exclusively on decisions respecting disclosure of grand jury materials to *private parties* for civil litigation (see Pet. App. 14a).[41] In *Douglas Oil Co.* v. *Petrol Stops Northwest*, *supra*, for example, this Court carefully framed the question presented as "[W]hat justification for disclosure must a *private party* show in order to overcome the presumption of grand jury secrecy." 441 U.S. at 213 (emphasis added). The rule announced in *Douglas Oil*, moreover, responds directly to this formulation of the issue; the Court instructed district courts considering a private party's motion for disclosure to weigh "the public interest in secrecy" against the private interest in disclosure, placing the burden on the "private party" to justify disclosure. *Id.* at 223. But where, as here, disclosure is sought by attorneys for the United States in furtherance of their responsibility to protect the public weal, the balancing task is fundamentally different, because the interests pitted against grand jury secrecy are public rather than parochial. Accordingly, the standard announced in *Douglas Oil* does not control the decision in this case.

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[41] We note as a threshold matter that the formulation "particularized and compelling need" employed by the court of appeals does not receive sanction in *Douglas Oil*.

Substantial policy and practical reasons, overlooked by the court of appeals, require application of a different standard when leave of court is sought to make disclosure to government personnel necessary to evaluate, prepare and prosecute a civil action. These reasons are essentially those explained above in connection with Point I of our argument (see pages 32-41, *supra*). First, insofar as disclosure to government attorneys is concerned, no disclosure order would be required if the civil litigation were handled by an attorney who assisted the grand jury or otherwise had become privy to the grand jury materials through his role in criminal proceedings. Hence, no substantial interest of affected parties is protected by the strict test announced by the court of appeals, because such persons have no interest in the identity of the particular government counsel who employs grand jury material in civil litigation. Accordingly, like the court of appeals' interpretation of Rule 6(e)(3)(A)(i), the instant ruling serves primarily to interfere with the Attorney General's exercise of discretion respecting the allocation of responsibilities within the Department of Justice and the United States Attorneys' Offices.[42]

The court of appeals also failed to consider the substantial public interest in redressing fraud against the United States or in civil enforcement of other Acts of Congress such as the antitrust laws. Enactment of civil legislation of this kind, no less than enactment of a criminal statute, is a compelling indication of the public interest in disclosure to which the courts should give substantial weight in determining whether disclosure is warranted. No comparable public interest is served by disclosure of grand jury materials for use in private litigation.

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[42] On the other hand, assuming that disclosure is available to Civil Division attorneys under Rule 6(e)(3)(A)(i), it is difficult to perceive any interest in depriving government attorneys of the assistance of personnel needed to make such disclosure effective and meaningful.

Even if *Douglas Oil* supplied the applicable standard for disclosure here, the court of appeals' decision should be reversed, for it represents a serious misapplication of that standard. Contrary to the view of the court of appeals (Pet. App. 14a) the balancing test established by *Douglas Oil* includes no fixed benchmark to be applied in every situation. Rather, even when the burden of justifying disclosure rests upon a private party, the Court stressed that (441 U.S. at 223):

> as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification.

As noted above (pages 33-34), disclosure of grand jury materials to government attorneys typically implicates few, if any, of the concerns that underlie the policy of grand jury secrecy. That is equally true of disclosure to government personnel who assist the attorney for the government. Use of grand jury materials disclosed to such personnel may be limited to the purpose of assisting the attorney for the government;[43] such a limitation is enforceable by the sanction of contempt. There is accordingly no reason to believe that disclosure to personnel assisting civil litigation attorneys in the Department of Justice will lead to further disclosure of grand jury materials within or outside the government, in the absence of an order authorizing such further dissemination. Given the attenuated strength of the considerations favoring unimpaired secrecy in the setting of a case such as this, disclosure to government personnel is properly authorized upon a showing that "the grand jury materials are rationally related to civil matters within the duty of an attorney for the government and that he requires assistance from the non-lawyers described" in the government's motion. *In re Grand Jury (LTV)*, *supra*, 583 F.2d at 131. In view of the limited infringement of grand jury secrecy

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[43] Rule 6(e) authorizes the district courts to impose appropriate conditions upon any disclosure order.

involved, this standard is sufficiently demanding to protect grand jury secrecy. At the same time, the test does not present an unreasonable barrier to plainly legitimate use of grand jury materials by the government.

By contrast, the rigid standard announced by the court of appeals will frustrate the legitimate civil use of grand jury materials. It may prove difficult for Department of Justice attorneys to show "particularized and compelling need" for disclosure to non-attorney personnel, or personnel outside the Department of Justice, when a case is first referred for evaluation by a United States Attorney or the FBI, because technical assistance may be necessary before the case can be properly evaluated. This hurdle may prove insurmountable if this strict showing must be made even before Department of Justice attorneys specializing in the contemplated area of civil litigation may review the grand jury materials. If the Civil Division cannot surmount the barrier created by the court in the preliminary stages of a case, it will have to devote resources to duplicating already completed investigations so that its attorneys can determine if a case should be pursued further. See *In re Grand Jury (LTV)*, *supra*, 583 F.2d at 131. Given the finite resources available, this will cause a reduction in the number of enforcement actions the Division is able to prosecute. In any event, the court of appeals' decision will substantially impair the utility of an important tool for screening and evaluating cases prior to filing a complaint.

Because the court of appeals' decision substantially restricts civil use of grand jury materials by the Department of Justice in circumstances where no grand jury abuse has occurred, it is contrary to the intentions of Congress as revealed in the legislative history of the 1977 amendment to Rule 6(e). The Senate Committee Report (S. Rep. No. 95-354, *supra*, at 8) affirms that Congress had

> no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes. On the

> contrary, there is no reason why such use is improper, assuming the grand jury was utilized for the legitimate purpose of a criminal investigation.[44]

See also 123 Cong. Rec. 25196 (1977) (remarks of Rep. Wiggins) (see pages 31-32, *supra*). Congress plainly viewed government use of grand jury materials for civil law enforcement purposes as presumptively proper. The heavy burden of justification placed upon the government by the decision below is accordingly incompatible with the intent of Congress.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1982

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[44] The Committee Report also states that the standard to be applied to government disclosure motions should be no more restrictive than that established by prevailing case law. S. Rep. No. 95-354, *supra*, at 8. As explained above (page 31 note 28), however, the Committee's citations to this Court's *Procter & Gamble* decision and to *Robert Hawthorne, Inc.* v. *Director of Internal Revenue Service*, *supra*, are ambiguous. Neither case applies a "particularized and compelling need" standard to a government disclosure application, and accordingly neither provides any support for the decision of the court of appeals.

APPENDIX

1. Federal Rule of Criminal Procedure 54(c) provides in pertinent part:

> **Application of terms.** As used in these rules the following terms have the designated meanings.
>
> * * * * *
>
> "Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney * * *.

2. Federal Rule of Criminal Procedure 6(e) provides in pertinent part:

> **Recording and Disclosure of Proceedings.**
>
> * * * * *
>
> **(2) General Rule of Secrecy.**—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.
>
> **(3) Exceptions.**
>
> (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—
>
> (i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A) (ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

3. As originally prescribed in 1946, Federal Rule of Criminal Procedure 6(e) provided in pertinent part:

> Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before a grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 379881 1081

Respondent's Brief

No. 81-1032

Office - Supreme Court, U.S.
FILED
NOV 15 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,

Petitioner,

v.

SELLS ENGINEERING, INC., et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF RESPONDENTS

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STATEMENT

This case is unusual for a Rule 6(e)[1] case in three major respects. *First*, because the grand jury investigation straddles a period involving considerable revision of Internal Revenue Service procedures in dealing with the grand jury. During the investigation a number of that agency's operating manual sections relied upon in this case later came under judicial criticism and were withdrawn at the suggestion of the United States Department of Justice. *Second*, because the time frame straddles the October 1, 1977 amendment to Rule 6(e)[2] and the case involves both prior and post Rule 6(e) requirements. *Third*, because the record contains numerous sworn affidavits of subpoenaed grand jury witnesses and of government personnel, excerpts from witness interrogation transcripts, and excerpts from IRS procedural manuals. These were all included as part of a very comprehensive grand jury abuse motion and government opposition papers filed in the criminal case but never heard (C.R. 1-459).[3] These papers were all incorporated in respondents' opposition to the government's Rule 6(e) motion in this case. *These affidavits, transcript excerpts and related materials provide a vivid picture of the full extent and nature of the "agency" involvement with the grand jury and direct participation in its proceedings.* Respondents have carefully referenced this Statement to the record and have drawn heavily on the government's own affidavits and procedural manuals to show the full extent of this involvement. Respondents submit this carefully documented Statement to demonstrate the type of agency activity that easy government access under Rule 6(e) encourages.

A. Conversion Of The IRS Administrative Proceeding Into An Open-Ended Grand Jury Investigation

In 1973 Internal Revenue Agent Mark Rogers (hereafter "Agent Rogers") was assigned by the Internal Revenue Service (hereafter "IRS") to conduct an administrative audit of Sells Engineering, Inc. and related business entities in order to determine additional taxes due for tax years 1971 - 1973. In November 1974, the IRS converted this audit into a combined civil and criminal administrative investigation under the

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1 Federal Rules of Criminal Procedure 6(e) (hereafter referred to as "Rule 6(e)").

2 Amended July 30, 1977 effective Oct. 1, 1977, under Pub. L. No. 95-78, 91 Stat. 322.

3 "C.R." referes to the district court clerk's compiled record on appeal followed by the page references, and, where applicable, the paragraph or line references. Respondents specified that certain of the key affidavits and related materials in the clerk's record be printed in the Joint Appendix ("J.A." hereafter) for quick reference. Numerous important references are additionally made directly to the clerk's record.

direction of Special Agent Edwin W. Wordell of the Intelligence Division (hereafter "Agent Wordell") with Agent Rogers assisting (C.R. 209 at par. 4). From January 1975 through May 1976, Agent Wordell issued 26 administrative summonses to produce records of Sells Engineering, Inc. and other entities (C.R. 209 at par. 5).

Respondents and others moved to quash a number of these summonses in the District Court for the Southern District of California, but the Honorable Howard B. Turrentine ordered enforcement of all challenged summonses except as to one partnership. Appeals from Judge Turrentine's rulings were taken by both respondents and government. Judge Turrentine, upon motions of respondents, stayed enforcement of all the summonses pending the appeals. Agent Wordell, within three months of Judge Turrentine's January 1976 stay order, submitted a ". . . request for *open-ended*[4] Grand Jury proceedings in accordance with [IRS] Manual Section 9267.4. . . . to the District Director of Internal Revenue. . . ." (*Emphasis added*, Wordell afft. J.A. 13 at par. 41 and 42).[5] The District Director's Office evaluated Agent Wordell's request for an open-ended grand jury investigation and recommended the same to the Department of Justice which approved the request on August 2, 1976 (IRS Asst. Dist. Counsel Kamp afft. J.A. 19).

In August 1976 an open-ended grand jury investigation commenced (No. 76-6, hereafter called the "76-6 Grand Jury") and *the same IRS*

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[4] The term "open-ended" (grand jury proceedings) comes directly from the IRS Manual and refers to an open-ended or exploratory investigation under the sweeping subpoena powers of the grand jury to be sought by IRS agents if administrative proceedings "are stymied," the results of which might result in the IRS recommending prosecution. The Ninth Circuit, at footnote 2 of its opinion, highlights the relevant excerpts from Internal Revenue Manual § 9267.4 (Pet. App. 3a). The full text is contained in J.A. 3-4. After the open-ended grand jury investigative phase was completed, the IRS would then determine whether to recommend prosecution (*Id.* Internal Revenue Manual § 9267.4(7)). This entire procedure later came under criticism even by the Department of Justice as "not sustainable . . . in that *control of the investigation does not remain within the authority of the Grand Jury.*" (Emphasis added, IRS Manual Supp. July 29, 1977 Sec. 2.02, C.R. 167.) § 9267.4 is reported to have been subsequently withdrawn in November 1977 (*In Re Grand Jury Subpoenas April 1978, at Baltimore*, 581 F.2d 1103, 1107, n. 9 (4th Cir. 1978).) The facts respondents set forth in this Statement demonstrate just how those procedures were implemented. It is respondents' contention that these facts also demonstrate that the IRS literally *orchestrated* the entire process from the initial implementation of the open-ended grand jury proceedings right through the grand jury investigation and the indictment; and, while so "assisting" the grand jury used its broad powers to marshall evidence to be obtained wholesale under Rule 6(e) for use in later tax collection proceedings.

[5] "J.A." herein refers to the printed Joint Appendix filed in these proceedings, followed by the page reference and where applicable the paragraph reference.

Agents Rogers and Wordell were assigned to assist the United States Attorney (hereafter U.S. Attorney) in conducting that investigation (Chief Asst. U.S. Attorney Warren P. Reese afft. (hereafter CAUSA Reese) C.R. 315 at lines 6-28). Subpoenas were immediately[6] issued under the 76-6 Grand Jury to obtain the *same* materials that were the subject of Judge Turrentine's stay orders pending the appeals taken on his enforcement orders in January 1976.[7] The United States Court of Appeals For the Ninth Circuit (hereafter the "Ninth Circuit"), upon later learning during oral argument in those appeals that the same materials were then in the hands of the grand jury, remanded the matters back to Judge Turrentine for further consideration on October 13, 1978 (C.R. 6). As the Ninth Circuit opinion in this case notes, "the [IRS] did not further pursue enforcement [of its civil summonses] and the action was dismissed by the district court for lack of prosecution" (Pet. App. 2a, n. 1).

The grand jury was conducted under two separate identified grand juries, the investigating grand jury (the 76-6 Grand Jury) and the indicting grand jury (No. 77-3 hereafter the "77-3 Grand Jury"). The investigation commenced in August 1976 under the 76-6 Grand Jury *and continued under that grand jury until it expired in November 1977.* (*See* CAUSA Reese Afft. C.R. 315 at lines 10-28 with C.R. 317 at lines 12-24.) The 77-3 Grand Jury was "assembled to hear evidence" with its "first meeting" on this subject matter investigation "scheduled for March 28, 1978." (See CAUSA Reese Afft. C.R. 319 at lines 6-18.) The wording of the affidavit of CAUSA Reese throughout clearly indicates that these two grand juries were the *only ones actually utilized* as he repeatedly refers to "the previous grand jury" in the singular sense when discussing the presentation for indictment before the 77-3 Grand Jury. (*See* C.R. 321 at line 24 to 322 line 2 and at 20-32.) There appears to have been no grand jury actually utilized in the gap between November 1977 and March 1978 while the investigation was ongoing. This review of the CAUSA Reese Affidavit demonstrates that the statement made by the court below that "In May 1977 a federal grand jury was convened to investigate [respondents]" is in error in that it was convened in August 1976 and that the government brief at page 2 (text and Footnote 1) is misleading on this point.

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[6] See, *e.g.*, Affidavit of John S. Dimaggio regarding subpoena to produce documents before the grand jury in August 1976 (J.A. 35).

[7] "[T]he information called for by the grand jury subpoenas was essentially the same as sought by the IRS through issuance of administrative summonses" (Gov't. Rpl. Br. on Pet. 5, n. 4). At the outset of the grand jury investigation, Agent Wordell provided the Assistant U.S. Attorney copies of the administrative summonses which described the documents he felt were initially necessary in the investigation so that these materials could be subpoenaed (Wordell Affi. C.R. 223 at lines 1-6).

B. The IRS Involvement In Grand Jury Investigation Procedures

With IRS Agents Wordell and Rogers assisting the U.S. Attorney's Office with the open-ended grand jury investigation instigated by Agent Wordell, numerous subpoenas were issued from August 1976 through 1977.[8] Seven sworn affidavits (J.A. 22-38) signed by witnesses subpoenaed to appear before the grand jury but instead interrogated by Agents Wordell and Rogers,[9] as well as transcript excerpts from some of those interrogations, establish a strong *prima facie* case as follows:

1. Agent Wordell's practice was to directly contact these witnesses after service of a subpoena (or under threat of subpoena) to divert these witnesses to an interrogation outside of the presence of the grand jury (*See, e.g.,* Clemesha afft. J.A. 33 at par. 4, Barr Afft. J.A. 37 at par. 3 & 4, Woody afft. J.A. 27 at par. 3, DiMaggio afft. J.A. 35 at par. 7);[10]

2. Agent Wordell tried to establish on the record in each case that the witnesses were appearing before him "voluntarily" on a prearranged basis (*See, e.g.,* Woody transcript, C.R. 269 at lines 23-25 and C.R. 270 at lines 1-18, Sanchez transcript C.R. 272 at lines 9-18, Kimball transcript C.R. 263 at lines 26-28 and C.R. 264 at lines 1-3 and C.R. 266 at lines 1-8. *See also* Tilley transcript C.R. 367 at lines 4-25 and C.R. 368 at lines 1-19 and C.R. 370 at lines 13-25 and C.R. 371 at lines 1-14);

3. Agent Wordell at times indentified himself only as a Special Agent of the IRS and not as an assistant to the U.S. Attorney or grand jury (*see, e.g.,* C.R. 269 at line 17 to C.R. 270 line 18; C.R. 366 at line 17 to C.R. 367 line 2);

4. In at least one interrogation Agent Wordell let slip that he personally perceived that the grand jury subpoenas were being issued to get witnesses "to appear before me" (Woody transcript C.R. 269 at line 23) and that the interrogation induced by the grand jury subpoenas were

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[8] Grand jury subpoenas served on several important witnesses gave only the street address of the Federal Building provided along with the name of the AUSA and his phone number. The San Diego Federal Building is several hundred thousand square feet of space facing six streets with a myriad of rooms on several floors. This necessitated a call to the named AUSA for further instructions where to appear. Respondents suggest this was part of the intended procedure of subpoenaing and diverting witnesses to "voluntary" interrogation before Agents Wordell and Rogers.

[9] Additional witnesses the record shows to have been similarly interrogated directly by Agent Wordell include William F. Tilley (see text accompanying n. 13 *infra*), Alvin L. Becker (C.R. 255), John Hycz and John Macias (C.R. 191 at lines 9-10).

[10] This was sometimes accomplished with the direct assistance of the AUSA (*See* Tilley transcript C.R. 453 at lines 4-24; *see also* C.R. 190 at lines 12-20).

actually part of "an income tax investigation I am conducting" (*Id.* at 270 lines 4-10).

5. These interrogations were undertaken by Agents Wordell and Rogers often without an assistant U.S. attorney (hereafter AUSA) even being present (*See, e.g.,* C.R. 269 and 263);

6. The witnesses were sworn (*See, e.g.,* Tilley transcript 454 at lines 17-25) and the interrogations were transcribed by a stenographer from a private reporting service (*See, e.g.,* C.R. 270 at lines 19-23, C.R. 272 and 366). Some of these interrogations were apparently also recorded by Agent Wordell on a tape recorder (C.R. 263at line 1);

7. An attorney for the witness was present in some of the interrogations, and one even brought his own stenographer (C.R. 263 lines 21-25);

8. Several of the witnesses were asked to sign an affidavit following their interrogations, as prepared by Agent Wordell (*See, e.g.,* J.A. 26 at par. 7, J.A. 28 at par. 9, J.A. 31 at par. 9, J.A. 33 at par. 6, J.A. 37 at par. 6. *See also*, C.R. 361 at lines 3-4 and 28, 363 at lines 12-15, 364 at lines 21-24);

9. In some situations the answers of the respective witnesses were obtained by Agent Wordell under a letter offering immunity following service of a grand jury subpoena (*See* Miller afft. C.R. 357 at lines 3-21 *re* Sanchez, C.R. 358 at lines 12-17 *re* DiMaggio, C.R. 360 at lines 17-21 *re* Woody. *See also* C.R. 198-205);

10. None of these seven key investigation witnesses ever actually testified before any grand jury.[11]

It is these "voluntary" interrogation procedures that were referenced in the Ninth Circuit opinion (Pet. App. 3a-5a, n. 2) that the court considered "similar" to the procedure prescribed under Internal Revenue Manual § 9268 which was later withdrawn by the IRS at the insistence of the Justice Department by a series of telegrams after coming under judicial criticism.[12] These "voluntary" interrogation procedures implemented by Agents Wordell and Rogers under the auspices of the U.S. Attorney's Office commenced in August 1976 and continued without change until at

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11 *See* Part D *infra.*

12 Sent November 24, 1976, April 11, 1977 and June 2, 1977 (IRS Manual Supplement July 29, 1977 C.R. 167-68). No focus was put on these activities by the U.S. Attorney until respondents filed their grand jury abuse motion in the criminal case asking for an evidentiary hearing with regard to them (*see also* n. 4, *supra*). Respondents quote this disapproved Internal Revenue Manual Section with applied emphasis:

(Footnote 12 continued on page 6)

least February 1978.

These affidavits are further corroborated by the Affidavit of J. Parkinson Miller, Esq. (C.R. 354-371) the attorney who advised several of the witnesses who were subpoenaed to appear and then were interrogated by Agents Wordell and Rogers. Attached to Mr. Miller's affidavit is a copy of the transcript of the interrogation by Agent Wordell of an additional witness William F. Tilley prepared by a private reporting service hired by the government for that purpose (C.R. 366-371).[13] This interrogation was undertaken by Agent Wordell *on February 6, 1978*[14] and was attended by Agent Rogers, CAUSA Reese and Mr. Miller. Mr. Wordell stated on the record that he was "*currently* assisting an investigation by the Grand Jury relating to tax matters, and other matters involving among others [respondents] . . . and you were subpoenaed to appear before the Grand Jury; is that correct?" (Emphasis added, C.R. 366 line 21 to C.R. 367 line 1.) The term of the first grand jury (No. 76-6) expired in November 1977 (CAUSA Reese afft. C.R. 317 at lines 12-13). The second grand jury (No. 77-3) was not "assembled to hear evidence" and did not have its first meeting "scheduled until March 28, 1978" (*Id.* 319 at lines 12-18). The grand jury subpoena had been served on the witness for a grand jury

(Footnote 12 continued)

9268 Secrecy of Grand Jury Proceedings and Disclosures

(1) Following an appearance before a grand jury, ***such grand jury witness should be interviewed by a special agent*** in an attempt to obtain the same information which the witness furnished to the grand jury. ***If the witness cooperates, any question of grand jury secrecy and the Service use of grand jury testimony for both criminal and civil purposes can thus be avoided.***

(2) If the witness refuses to respond to the questions asked by the special agent, the United States Attorney should be asked to obtain a court order under Rule 6(e), Federal Rules of Criminal Procedure (18 U.S.C. app.), to authorize the Service use of grand jury testimony for both criminal and civil purposes. ***This information cannot be used for civil purposes, however, unless cooperation of the witness is obtained in providing the same information*** which the witness gave to the grand jury, ***or*** it becomes part of a public record, such as in a court proceeding, ***or*** a court order is obtained under Rule 6(e), Federal Rules of Criminal Procedure that authorizes the use of the information for civil purposes. ***Failure to obtain at least one of these*** and a subsequent disclosure in civil proceedings could result in a possible contempt citation for improper disclosure of grand jury materials. (Emphasis added.)

13 The same Tilley transcript is also attached as Exhibit "A" to the affidavit of Warren P. Reese Chief Assistant U.S. Attorney (C.R. 452-56).

14 Respondents submit that the February 6, 1977 date given at Line 21 of Mr. Miller's Affidavit (C.R. 354) is a typographical error as to the year 1977 and should have stated February 6, 1978. The Tilley interrogation transcript shows the date of February 6, 1978 (C.R. 366) and the Miller affidavit states that Miller made arrangements to meet with Mr. Tilley in the morning prior to his interrogation (C.R. 354 at liens 21-25).

appearance on January 27, 1978 (CAUSA Reese afft. C.R. 447 lines 10-14). CAUSA Reese acknowledged on the record to Mr. Miller that he wanted Mr. Tilley to testify before an investigtive arm of the IRS (C.R. 367 at lines 11-24, 368 at lines 5-16). CAUSA Reese actually suggested this alternative to Mr. Tilley (C.R. 447 at lines 24-27 and 448 lines 2-4). It appears from the record that a grand jury subpoena was served through the U.S. Attorney's office for a grand jury witness appearance in January 1978 when unbeknownst to the witness no grand jury was even "assembled" to hear this testimony, and CAUSA Reese intended to divert the uninformed witness to interrogation by a Special Agent of the IRS.[15]

Judge Thompson refused to consider respondents' abuse arguments in releasing the grand jury materials to the Civil Division of the United States Department of Justice (hereafter the "Civil Division" -- *see* part F *infra*). The Ninth Circuit court held as part of its decision in remanding this case to the district court:

> "Any grand jury abuse that has occurred is relevant to the district court's decision whether to disclose, and the court should consider [respondent's] allegations of such abuse." (Pet. App. 17a; citations omitted.)

C. Exposure Of Grand Jury Materials To IRS Personnel

During the open-ended grand jury investigation, and prior to presentation of any case to the grand jury seeking an indictment, the results of the Wordell/Rogers interrogation and other grand jury materials were disseminated to and discussed with, seen or reviewed by *at least 19 IRS personnel.*[16] No Rule 6(e) order from the district court was

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15 Respondents acknowledge the possibility of the existence of another grand jury panel before which witness Tilley might have been able to testify on the appearance date, but submit that such would be a meaningless exercise if that grand jury did not actually intend to consider the matter. That alternative would simply further demonstrate that the intent from the outset was to divert witness Tilley to an interrogation by Agent Wordell, as the record itself clearly indicates.

16 These 19 named IRS pesonnel are all identified from the government's own affidavits as follows: Special Agent Edwin H. Wordell (C.R. 315 lines 17-23); Agent Mark F. Rogers (C.R. 315 lines 17-23); Agent Charles H. Bruce (C.R. 312 & C.R. 220); Special Agent Alphonson Martinez (C.R. 274); Special Agent Garey Pacey (C.R. 274); Special Agent Robert Meyer (C.R. 221); Group Manager James Nielsen (J.A. 13); Branch Chief William J. McMonigal (C.R. 273); Chief Intelligence Division Ronald Saranow (J.A. 13); Regional Counsel Attorney Lee A. Kamp (J.A. 13 & 19); Regional Counsel Attorney David P. Fuller (J.A. 13 & 15); Regional Counsel Attorney Martin Klotz (J.A. 13 & 20); Technical Advisor Vernon Lynch (J.A. 13 & 17); Computer Specialist Gloria Hall (J.A.

(Footnote 16 continued on page 8)

obtained in the appointment of Agents Wordell and Rogers to assist, nor to involve any of the other identified IRS personnel, in the open-ended grand jury investigation initiated by the IRS (*See* R.T. 32 line 13 to R.T. 33 line 9, R.T. 36 at lines 4-8 and J.A. 39-42).[17]

In October 1977, an investigative grand jury report was forwarded by Agent Wordell [to the IRS District Counsel's Office in Los Angeles, California] "for evaluation of the evidence." (Asst. Dist. Counsel Kamp afft. J.A. 20.) This report followed the interrogations conducted by Agents Wordell and Rogers as previously outlined under Part B. Little meaningful evidence was ever presented to the 76-6 Grand Jury (CAUSA Reese afft. C.R. 322 at lines 27-30).[18] Instead, the documents, and witness answers obtained through the Wordell/Rogers interrogation procedures, using the 76-6 Grand Jury's subpoena powers were disseminated internally within the IRS for evaluation through Agent Wordell's report (J.A. 21). IRS Regional Office personnel then reviewed the grand jury materials held in the grand jury ante-room in San Diego, California (CAUSA Reese afft. C.R. 318 at lines 17-24). Based on this evaluation, the IRS Regional Office recommended prosecution which recommendation was forwarded to the Tax Division of the Justice Department which evaluated the IRS recommendation and in turn recommended prosecution to the U.S. Attorney's Office in San Diego, California. (*Id.* C.R. 318 at lines 25-31, C.R. 319 at lines 25-28.)

(Footnote 16 continued)

13); Criminal Investigation Aid David Duran (J.A. 13); Criminal Investigation Aid Ramon Chavez (J.A. 14); Criminal Investigation Secretary Jane Frazer (J.A. 14); Regional Counsel Secretary Marie A. Zuniga (J.A. 20); Regional Counsel Secretary Lena Fleischer (J.A. 20).

In addition, materials and testimony obtained under grand jury subpoena were apparently exposed to numerous people in private stenographic reporting services (*See e.g.*, C.R. 270 at lines 19-24 and C.R. 272, 366 and 263 at lines 21-25) during interrogation of witnesses and subsequent preparation of transcripts. The record does not show if any of these people were sworn to secrecy.

17 "R.T." refers to reporter's transcript of proceedings of the district court of appeal followed by page and line reference. It is respondents' contention that such an order should have been obtained under then current law as the amendment to Rule 6(e) permitting additional technical personnel to assist did not go into effect until October 1, 1977, over a year after Agents Wordell and Reese were assigned to "assist" the grand jury.

18 *No* grand jury ever heard this evidence from the witnesses interrogated by Agent Wordell except in summary hearsay form given by Agents Wordell and Rogers (*See* Part D *infra*).

D. Indictment Through IRS Agent Hearsay Summary Testimony

The indictment was obtained from a totally different grand jury (77-3) assembled in March 1978 for the presentation of the hearsay testimony of Agents Wordell and Rogers who presented in summary form *their* view of the results of their earlier interrogations accomplished under grand jury subpoenas (See CAUSA Reese afft. C.R. 322 at lines 3-19). None of the witnesses interrogated by Agents Wordell and Rogers were ever called before the 77-3 Grand Jury that handed down the indictment.[19] The CAUSA Reese affidavit acknowledges that the 77-3 Grand Jury had played no part in the investigation and heard no prior testimony. The same affidavit strongly suggests that the 76-6 Grand Jury played a *de minimis* role in the open-ended investigation except for the use of its sweeping subpoena powers. (*See* C.R. 322 at lines 20-30). Of the witnesses referred to in this Statement, referred to in the record of this case, or known to respondents, it appears that only three non-government witnesses ever appeared before any grand jury -- two of them *solely to produce records* (witness DiMaggio August 1976 J.A. 35, and witness Horn November 1976 C.R. 185 lines 18-30) and the third who was finally called before the grand jury and invoked the fifth amendment *after two separate interrogations under subpoena by Agent Wordell* (witness Kimball C.R. 192 lines 10-13). Even witness DiMaggio was separately interrogted as to his personal knowledge by Agents Wordell and Rogers under subpoena at a later time (J.A. 35), and the only possible interest in witness Horn was for records as he was an accountant brought in to assist defendants during the grand jury investigation.

E. The Tax Conviction And Agreed Statement Of Facts

1. Respondents Sells and Witte pled guilty to a single count of conspiracy tax fraud. As a condition of the plea bargain they were required to execute on December 15, 1978 before entering their guilty pleas, an "Agreed Statement of Facts in Support of Guilty Pleas" (C.R. 495-514; hereafter "Agreed Statement of Facts") which would constitute a clear admission of tax liability in a civil tax proceeding. In reality this 19 page legal sized document is a *very detailed financial analysis* that could have been prepared only by the IRS, itemizing and explaining every single fraudulent deduction from which the exact amount of back taxes, statutory penalties and interest can be calculated for each defendant for each investi-

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[19] The only other witness that testified before the indicting grand jury was Mr. Stephen Wojdowski (CAUSA Reese afft. C.R. 322 at lines 3-19), a government employee from the Defense Contract Audit Agency who respondents believe testified only as an expert knowledgeable about government contract procedures.

gated tax year -- *all carefully prepared from the grand jury materials* 18 *months before any Rule 6(e) order was ever sought by the IRS* (*See* n. 27 *infra* and text accompanying n. 17 *supra*).

2. The Government states that respondents "Sells and Witte pleaded guilty to one count of conspiracy to defraud the United States" (Gov't. Br., 4). They neglect to clarify, however, that the guilty plea obtained out of the eleven count indictment was for only County Two of the indictment dealing with tax fraud, not Count One dealing with Navy contract fraud. Count One, the only count involving the alleged Navy contract fraud, was dismissed as to respondents Witte and Sells pursuant to a disposition Agreement (C.R. 515).[20] The Agreed Statement of Facts extracted as part of the plea bargain was drafted to admit only tax fraud, not Navy contract fraud. The Government *presumes* in its brief that respondents are guilty of Navy contract fraud under Count One of the indictment and implies that it is simply seeking to enforce civil recovery for acknowledged guilt.[21] The Government ignores respondents consistent denial of guilt under Count One while admitting to conspiracy tax fraud under Count Two. The 6(e) order in question here was for the release of Grand Jury materials to the Justice Department to evaluate the statute of limitations for a possible civil action to be brought involving alleged Navy contract fraud (C.R. 437 at lines 11-13).

F. The Rule 6(e) Order

The Rule 6(e) proceedings in this case were heard before Judge Tompson on December 7, 1978 (R.T. 3-38) and on December 18, 1978 (R.T. 64-83). On December 7, 1978 the Civil Division attempted to proceed *ex parte* and argued that they needed return under Rule 6(e) of *the governemnt's own documents* (R.T. 26 line 25 to R.T. 27 line 4) in order to ascertain when the statute of limitations might run under the False Claims

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20 The Disposition Agreement was negotiated and entered into in a late night negotiation session directly with U.S. Attorney Michael H. Walsh and finalized only hours before the calendared hearing on respondents' comprehensive grand jury abuse motion seeking among other things, an evidentiary proceeding on the abuse issues (*See* R.T. 18 line 7 to R.T. 20 line 22). This was the same motion that was additionally incorporated by reference into respondents' opposition papers in these proceedings (*See* Part F *infra*). It was the concern as to what would be developed in an evidentiary hearing that respondents believe persuaded the U.S. Attorneys Office to enter into the late night Disposition Agreement, including an agreed limitation on sentencing (C.R. 516 par. 2).

21 *See e.g.*, Gov't. Br. p. 39 where it states:

"Attorneys engaged in False Claims Act enforcement report that a significant proportion of False Claims Act cases involve elaborate schemes to defraud the United States, *such as the one conducted by respondents.*" (Emphasis added.)

Act[22] (*See* C.R. 521 at par. 2.[23] *See also* R.T. 27 line 25 to R.T. 28 line 3, and R.T. 30 lines 14-18). At that time the comprehensive grand jury motion filed by respondents Sells and Witte in the criminal case was scheduled to be heard on December 15, 1978, eight days later. The grand jury abuse motion was incorporated by reference into these Rule 6(e) proceedings by respondents opposition papers and oral arguments.[24] Respondents Sells and Witte argued on December 7th that no Rule 6(e) order should be entered until the court had first addressed the abuse issues raised in this calendared motion (*See* R.T. 18 line 7 to R.T. 20 line 22; *and see* R.T. 33 line 22 to R.T. 34 line 24). The court continued the matter to December 15, 1978.

On Friday, December 15, 1978 respondents Sells and Witte entered guilty pleas to one count of conspiracy tax fraud. (*See* Part E *supra.*) This mooted the grand jury abuse motion to be heard that day in the criminal case resulting in the motion being withdrawn and not argued in that case as originally calendared. The hearing in the Civil Division's Rule 6(e) proceedings was continued to the following Monday, December 18, 1978 at which time the court heard further argument on the Civil Division 6(e) motion (Commencing at R.T. 64). The Civil Division by then had expanded its request to literally *all* of the grand jury materials (R.T. 64 line 19 to R.T. 65 line 3) with no additional reason stated other than objecting to even hearing from defendants on the motion (R.T. 77 lines 8-13) on the grounds the Civil Division was entitled to all grand jury materials *ex parte* as a matter of right. Respondents again urged the court to consider their allegation of abuse and allow an appropriate hearing on the subject (R.T. 67 line 24 to R.T. 68 line 8; R.T. 74 line 12 to R.T. 75 line 5 and lines 20-24). Respondents objected to release of the materials on three basic grounds: (1) That Civil Division attorneys performing civil litigation duties were not "attorneys for the government" as that term is used in Rule 6(e)(3)(A)(i); (2) That no particularized and compelling need had been shown for the

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22 The Rule 6(e) order was obtained on December 18, 1978. A single judge interim stay was entered by Justice Carter the same day and was set aside by the Ninth Circuit on February 27, 1979. No civil action was filed in this matter to stop the running of any statute of limitations, however, until September, 1978, *some seven to nine months later.*

23 The government's initial moving papers (C.R. 519-522) dated December 5, 1982 were acknowledged as before the court during the December 7, 1978 hearing, although they bear a December 20, 1978 filing stamp (R.T. 7 line 8 to R.T. 9 line 8). Respondents objected to the proceedings and lack of proper service of the moving papers (R.T. 8 at lines 10-25).

24 C.R. 465 at lines 5-20. *See also* R.T. 20 at lines 8-22; R.T. 34 at lines 5-24; R.T. 67 line 24 to R.T. 68 line 8; R.T. 74 line 12 to R.T. 75 line 5 and at lines 12-24.

release of grand jury materials;[25] and (3) That the court had to first resolve, after an appropriate hearing, the threshold question of grand jury abuse that had been raised in respondents' opposition papers and in oral argument.

Judge Thompson essentially rejected all of respondents' opposition arguments: (1) by proceeding to rule that Civil Division attorneys were "attorneys for the government" in the performance of their civil duties within the meaning of Rule 6(e)(3)(A)(i) and had an absolute right to the material; (2) by *not* differentiating between the contrasting standards of "particularized need" and "rationally related" that were advocated and by not looking beyond the wording of the rule and noting relevant case law;[26] (3) by concluding that he need not address the grand jury abuse issues argued by respondents and incorporated into the Rule 6(e) proceedings opposition papers; and, (4) by releasing all of the grand jury materials (without limitation or specificity), instead of just the government's own documents which were the only ones originally requested and the only ones for which the Civil Division may have made any demonstration of need.

The IRS followed with its own Rule 6(e) motion in a subsequent proceeding which motion was also granted by Judge Thompson over respondents' objections after hearing.[27]

The Ninth Circuit in its decision in the instant case on appeal held essentially as follows: [1] Disclosure of grand jury materials to attorneys for the government under Rule 6(e)(3)(A)(i) is limited to the enforcement of federal criminal law; [2] Disclosure of grand jury materials to attorneys

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25 Respondent Sells Engineering, Inc. additionally argued, through independent counsel then appearing, that it needed the return of its own corporate records and urged the court to order the return to both the corporation and the government *their own records* to meet their respective needs. The corporation further urged that "[I]f [the Civil Division] chooses to file suit, [they could then] follow their usual discovery practices available to them pursuant to statute." (R.T. 71 at lines 1-15.)

26 Judge Thompson stated in his Oral Opinion:

"Now, I think that the government has shown *a particularized need* here. They have demonstrated that the grand jury materials are *rationally related* to civil matters within the duty of the attorney for the government . . . I don't think this court *is required to*, nor is it going to *look beyond what the statute provides*, or what the rule provides." (Emphasis added Pet. App. 23a).

27 On June 5, 1980 the Tax Division of the Department of Justice filed a motion for an order under Fed. R. Crim. P. 6(e)(3)(C)(i) from Judge Thompson for release of essentially all of the same grand jury materials. After hearing, this motion was also granted. The essential differences between the Rule 6(e) order as sought by the Tax Division in its motion

(Footnote 27 continued on page 13)

for the government for use in civil litigation requires an order from the district court under Rule 6(e)(3)(C)(i); [3] The government must demonstrate in an adversary hearing a particularized and compelling need for the disclosure of grand jury materials for civil litigation purposes; and, [4] Any grand jury abuse that has occurred is relevant to the district court's decision whether to disclose, and respondents' allegations of abuse should be considered.[28]

All related proceedings below involving the parties before this court are now in a holding status pending the decision of this court.[29]

SUMMARY OF ARGUMENT

The government has petitioned this Court to interpret two subsections of Rule 6(e) of the Federal Rules of Criminal Procedure to provide in

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(Footnote 27 continued)

and the Rule 6(e) order obtained by the Civil Division in the case is that it was *not* premised upon the "attorneys for the government" argument 6(e)(3)(A)(i), as that was not urged by the Tax Division, and that the government was required to *specifically identify* all of the grand jury materials it required and why it required them. Respondents believe that the comprehensive list ultimately provided the court was for *essentially all of the same* grand jury materials which were then also released. That order is now on appeal before the Ninth Circuit. It has been briefed and oral argument presented, but the Ninth Circuit has withdrawn the matter from submission pending this Court's decision (*See* Gov't. Br. 8-9, n. 8).

28 The government petitioned for rehearing *en banc* and no judge of the Ninth Circuit requested a vote for the matter to be further considered (Pet. App. 21a). The Senior District Judge (sitting by designation on the panel) that dissented in the decision dissented *only* on the grounds of "mootness." *He did not address the other issues decided by the panel.*

29 The civil action has remained totally dormant in the preliminary stages since September 14, 1981 with the government apparently awaiting the outcome of this case before proceeding. Administrative proceedings were initiated by the IRS to ascertain the amount of back income taxes to be assessed through *Agent Rogers* who personally contacted both respondents Sells and Witte *after* the Rule 6(e) order was obtained and *before* the decision of the Ninth Circuit. Apparently, as a result of the decision of the Ninth Circuit in this case, the IRS has since suspended its civil administrative collection procedures awaiting the decision of this Court. While the fact of these post 6(e) order contacts by Agent Rogers is obviously later extrinsic evidence not a part of the district court record, respondents' counsel as officers of the Court make this representation of fact to the Court. Its relevance lies in the fact that the *same* IRS agent has been used throughout all civil and criminal phases of the case and is now proceeding to "collect" taxes based upon his knowledge gained through "assisting" the grand jury. Respondents contend that the Agency has already *come full circle* under its "open-ended grand jury" procedures even though Agent Rogers himself had concern during the investigation about his future ability to civilly proceed (C.R. 161) and was ordered during the grand jury investigation to withdraw from any further civil aspects (C.R. 166).

combination virtually unrestricted access to grand jury materials for civil use. The government would have this Court sanction full access to grand jury materials under 6(e)(3)(A)(i) by any "attorney for the government" as that term is defined in Rule 54(c) regardless of the nature of his duty, function or client. The government would further have this Court apply a very loose and relaxed standard for the disclosure of such materials for civil purposes under 6(e)(3)(C)(i) to federal agencies and other government personnel whom an attorney for the government represents or with whom he works. What on the surface appear to be ingenuous questions the government would have this Court decide, in fact mask a far more fundamental issue--whether government should be encouraged to expand the function of the constitutional grand jury to discover and gather evidence for civil purposes in conjunction with a criminal investigation, to be later released for civil use under Rule 6(e).

Respondents are supported by four *amicus curiae* briefs from the American Bar Association, the American Civil Liberties Union, General Motors Corporation and The Miller Brewing Company. These friends of the Court, as vitally interested nonparties, have each made a material and somewhat different contribution for this Court's consideration. Rather than duplicate these efforts and replicate the points that have been well-made in those briefs, respondents have focused their efforts in ARGUMENT I on the more fundamental issues underlying the questions presented. Respondents' ARGUMENTS II and III are more condensed which was made possible by the contributions provided by these *amicus curiae* briefs and by respondents' own concurrent contribution as *amicus curiae* in *United States v. Baggot*, No. 81-1938 being reviewed by the Court, which has closely related issues involving Rule 6(e) and this case.

I

In ARGUMENT I respondents address the more fundamental question whether government should be encouraged to expand the function of the grand jury by providing easy access to grand jury materials under Rule 6(e) for civil use. ARGUMENT I proceeds as follows. It starts with an introductory discussion that puts in perspective the close interrelationship of two separate subsections of Rule 6(e) and how the extent of court control over one subsection [6(e)(3)(C)(i)] relates back to the extent and type of use made of the other subsection [6(e)(3)(A)(ii)]. POINT "A" reviews the history, purpose and function of the grand jury as a constitutional institution to investigate solely criminal law violations and that its use for the purpose of conducting civil discovery flouts the policy of our laws. POINT "B" explores the extent of erosion that has occurred in the independence and secrecy of the grand jury by reviewing specific agency

activities in this and several other cases that respondents submit constitute abuse of the constitutional grand jury process. Under POINT "C" respondents demonstrate that one of the agencies, the IRS--which was the prime mover in the grand jury investigation in this case--has actually had an established policy, employed here, of subordinating the grand jury to civil as well as criminal discovery to gather evidence to be released under Rule 6(e) for the collection of taxes. POINT "D" addresses what respondents believe is a threshold question that must be first addressed before any release of grand jury materials is made under Rule 6(e). The court below remanded the case for the district court to consider respondents' allegations of grand jury abuse and respondents submit that this threshold issue must be first decided before any release or use of grand jury materials can be made for civil purposes under either 6(e)(3)(A)(i) or 6(e)(3)(C)(i).

Substantively, respondents briefly review the constitutional purpose and function of the grand jury under the fifth amendment concluding, as has this Court, that it was and is intended to be an independent inquest of the people acting in secret as a bulwark between the sovereign and its subjects in the institution of criminal proceedings. Respondents then explore several lower court cases which, along with this case, demonstrate that the independence and secrecy of the grand jury have been in fact seriously eroded and compromised by agency involvement. The grand jury's function of investigating criminal activity has been consciously subordinated by at least one federal agency, the IRS, to the additional (if not primary) purpose of using the extraordinary subpoena power of the grand jury to gather evidence *ex parte* to be later obtained through Rule 6(e) for civil use. This has not only been the obvious intent and end result in this and several similar cases but respondents demonstrate by the instructions contained in the IRS' procedural manual that there was and is a conscious purpose of that agency to convert administrative audits into open-ended grand jury investigations. This procedural manual also demonstrates that the price the IRS expects to extract for their "assistance" in grand jury proceedings is the gathering of evidence under the grand jury subpoena power for civil use to be released to them later under Rule 6(e).

Respondents believe that the 1977 amendment to Rule 6(e), adopted by Congress to provide needed greater technical assistance to the grand jury, carries with it an increased danger of potential misuse of the grand jury by the very federal agencies providing that assistance. This makes the requirement for strict court control over disclosure of grand jury materials to federal agencies under Rule 6(e) more necessary than ever before to insure that the assistance to be provided is by the agencies for the benefit of the grand jury and not by the grand jury for the benefit of the agencies. Respondents suggest that this Court's decision on how easy the access to

grand jury materials should be for federal agencies under Fed. R. Crim. Pro. 6(e)(3)(C)(i), and to their surrogate attorneys under Fed. R. Crim. Pro. 6(e)(3)(A)(i), for civil use will have a material and lasting effect on the future use to which the grand jury system is put.

The function of the grand jury was constitutionally established to be essentially that which existed when carried into the constitution by the fifth amendment--its sole function is the investigation of criminal activity. It was and is to remain independent of the sovereign, which independence was to be assured by the secrecy of its proceedings. It was and is to act as a bulwark or "shield" against the possible oppression of the sovereign; and, that "shield" was to be assured by maintaining the independence of the grand jury through the doctrine of secrecy. This fundamental constitutional purpose is threatened by present practices of federal agencies often assisted by the prosecutor. Respondents urge that this Court restore the proper balance by a renewed and unequivocal declaration of the constitutional purpose, function and role of the grand jury and by a determination of the questions presented for review consistent therewith. By this fundamental approach respondents support the decision of the Ninth Circuit below, with which the Seventh Circuit seems in general accord, and urge it be affirmed as to both questions presented for review.

II

Respondents' ARGUMENT II points out that the question of whether an attorney for the government has an automatic right of access to grand jury materials for civil use under 6(e)(3)(A)(i) as the government urges or must proceed under 6(e)(3)(C)(i) as the Ninth Circuit held hinges not on the definition of "attorney for the government," but on the definition of his "*duty*" as that word is used in Rule 6(e)(3)(A)(i). Respondents contend, as the court below held, that the "duty" is for criminal law enforcement only and that this is a limitation on the term "attorney for the government." Respondents reach this conclusion by returning to consideration of the constitutional function of the grand jury, tracing through the reasons why the prosecutor was brought in to assist the grand jury in its proceedings, exploring what the intent of Congress was in adopting the original Rule 6(e) in 1946 and concluding that Congress had no intent to expand this duty with the 1977 amendment of Rule 6(e).

By comparison a federal attorney, as a civil surrogate, answers to and must satisfy a particular client he represents and these clients are separate federal agencies, departments or bureaus he serves, from whom he takes his instructions, and to whom he attorns. The numerous "hats" a federal

attorney may wear and the special powers of appointment that exist such as under 28 U.S.C. § 515 require that the courts must look to the *client*, *duty*, and *function* with which the attorney is involved and not the title he bears.

A prosecuting attorney performing his criminal function is also a technical assistant to the grand jury which relies upon him because of his broad responsibility for, and knowledge of, the enforcement of criminal law. In this capacity there is no reason why he should not be held to the same standard of secrecy with regard to the handling and disclosure of grand jury materials as are the technical people brought in to assist the grand jury under Rule 6(e). As the court below held, he should only be permitted to rely on and utilize grand jury materials for civil use after first obtaining a court order under Rule 6(e)(3)(C)(i).

III

In ARGUMENT III respondents address the policy considerations supporting the Court's retaining a tight reign on the secrecy of grand jury material to be equally applied to all parties, including the government for civil uses. The argument develops that this Court has, in a series of cases, established a clear and logical standard for permissable disclosure of secret grand jury materials--"particularized and compelling need." For the first time the Court is asked to establish a different and easier standard for governmental agencies--"rationally related." The courts below have differed on the application of the proper standard with the majority of the decisions applying the "particularized and compelling need" test. Little help exists in the myriad of cases below because they are inconsistent in their holdings and applications. In urging this Court to apply a consistent standard of "particularized and compelling need" to all parties seeking disclosure of grand jury materials for civil purposes, respondents believe it is important to explore the underlying policies involved. Respondents have identified and compiled ten underlying policy considerations in ARGUMENT III believed material. Four of them are discussed under that argument. Five of them have been separately discussed in respondents' brief as *amicus curiae* in *United States of America v. Baggot*, No. 81-1938 which has closely related issues involving Rule 6(e), and they are not therefore repeated in this brief. The tenth policy consideration is specifically addressed in one of the *amicus curiae* briefs in this case and is not repeated in this brief. These combined discussions should provide the Court with a thorough analysis of the material policy considerations. They collectively speak against easy government access to grand jury materials under Rule 6(e) for civil use and in favor of preserving the independence

and secrecy of the grand jury by strict control of access to thse materials for all parties.

ARGUMENT

I. THE FUNDAMENTAL ISSUE THIS CASE PRESENTS IS WHETHER GOVERNMENT SHOULD BE ENCOURAGED TO USE THE CONSTITUTIONAL GRAND JURY PERFORMING ITS CRIMINAL INVESTIGATION FUNCTIONS TO MARSHALL[30] EVIDENCE FOR CIVIL PROSECUTION.

Rule 6(e) is a codification of the common law concept of grand jury secrecy which was carried into the fifth amendment of the United States Constitution.[31] In order to properly focus on the Rule 6(e) questions the Court has been asked to decide, it will want to have in sharp focus the purpose of the first clause of the fifth amendment providing for a grand jury.[32] Respondents submit that this purpose was and is to maintain an independent inquest of the people to act in secret as a bulwark or "shield" between the sovereign and its subjects in the institution of criminal proceedings to ensure fair and effective criminal law enforcement.[33] Respondents further submit that this is a constitutional mandate against which all aspects of the grand jury system must be constantly tested to ensure tht this constitutional protection does not erode. It is this higher principal against which the questions now before this court must be weighed to determine what best serves the constitutional purpose of the first clause of the fifth amendment.

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30 Respondents use the word "marshall" throughout this brief as meaning "*to assemble and dispatch* (such as the elements of a railway train)," *Webster's Seventh Collegiate Dictionary*, copyright 1971 by G. & C. Merriam Co. Publishers (emphasis added).

31 *See Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 n. 9 (1979); *In re April 1956 Term Grand Jury*, 239 F.2d 263, 268 (7th Cir. 1956). *See also United States v. Tager*, 638 F.2d 167, 168 (10th Cir. 1980).

32 "*No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a grand jury . . .*", U.S. Const. Amend. V. cl. 1.

33 *See United States v. Calandra*, 414 U.S. 338, 342-43 (1974); *Costello v. United States*, 350 U.S. 359, 362 (1956); *Hale v. Henkel*, 201 U.S. 43, 59 (1906); *Ex Parte Bain*, 121 U.S. 1, 11-12 (1887). *See also* M. Pickholz and J. Pickholz, *Grand Jury Secrecy and the Administrative Agency: Balancing Effective Prosecution of White Collar Crime Against Traditional Safeguards* (hereafter cited as "Pickholz") 36 Wash. & Lee L.Rev. 1027 (1979).

The more federal agencies are encouraged by the free flow of grand jury materials made available to them for civil use through Rule 6(e), the more they will be motivated to broaden and increase that flow. Rule 6(e) provides two "switches" that essentially control the practical movement and use of grand jury materials in the investigation of economic crimes. These, like the switches in a railroad marshalling yard, can be used to limit the gathering, use, movement and ultimate dispatch of such materials. The capacity of one of these "switches" Congress decided should be increaed by creating 6(e)(3)(A)(ii) under the 1977 Rule 6(e) amendment[34] to provide greater *access by* the grand jury to necessary technical assistance in dealing with complex economic crimes to make the evidentiary materials more meaningful. The other "switch" 6(e)(3)(C)(i), which was *not* altered by Congress[35], has long been regulated by the courts to provide very limited *access to* grand jury materials under the secrecy doctrine. With the increased capacity and unmonitored use of the *access by* "switch", only strict court regulation of the *access to* "switch" will ensure that the grand jury is not used as a marshalling yard for the discovery, gathering and dispatch of evidentiary materials for civil prosecution purposes. These "switches" are closely interrelated, particularly when a fedeai agency is assisting the grand jury. The extent and type of use of 6(e)(3)(C)(i) (the *access to* "switch") permitted federal agencies by the courts inevitably impacts the extent and type of use they will make under 6(e)(3)(A)(ii). For this reason respondents believe the Court must closely examine this existing interrelationship under the two subsections of Rule 6(e) to determine just how easy under 6(e)(3)(C)(i) should be the access of federal

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34 *See* note 2, *supra.*

35 Rule 6(e)(3)(C)(i), the *access to* "switch," contains the same wording as existed in the original 1946 version--it is merely broken our in a structural subsection format. The entire purpose of the Congressional Amendment of Rule 6(e) in 1977 was to address the scope of technical assistance the grand jury should have available in order to properly evaluate highly technical and complex evidentiary materials which resulted in the opening up of the *access by* "switch" with the adoption of 6(e)(3)(A)(ii). Congress simply was not addressing the *access to* "switch" or the question of what assistance should the IRS and other federal agencies receive from the grand jury. Any such argument by the government to the contrary is wishful thinking. As stated in Senate Report No. 95-354 in considering H.R. 5864:

"The Rule as redrafted is designed to accommodate the belief on the one hand that Federal prosecutors should be able, without the time-consuming requirement of prior judicial interposition, to make such disclosures of grand jury information to other government personnel as they deem necessary to facilitate the performance of their duties relating to criminal law enforcement. On the other hand, the Rule seeks to allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws. . ." [S. Rep. No. 95-354, 95th Cong., 1st Sess. (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 527, 531 (hereafter cited as "Senate Report")].

agencies, or of their surrogates the attorneys in the Civil or Tax Division of the Department of Justice, to grand jury materials.

Numerous courts below and legal commentators have voiced strong reservations against opening the *access to* "switch" too freely. It has been frequently stated that the temptation of government agencies to use the awesome discovery powers of the grand jury for the dual purpose of criminal prosecution *and* the marshalling of evidence for later civil litigation would be unduly encouraged by providing easy access under Rule 6(e).[36] Respondents submit that: "A grand jury investigation *is not conducted in good faith* unless it is used to conduct investigations that are *in their inception exclusively criminal.*"[37] And, a grand jury investigation *is not conducted in good faith* if it is also used as a civil discovery

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[36] *See, e.g., United States v. Proctor & Gamble*, 356 U.S. 677 (1958) (Whittaker, J., concurring); *In the Matter of Grand Jury Proceeding, Miller Brewing Company*, as yet unreported, Nos. 81-2077, 81-2115 and 81-2407, slip op. at 19 (7th Cir. Sept. 3, 1982); *In re Special February, 1975 Grand Jury (Baggot)*, 662 F.2d 1232, 1237 (7th Cir. 1981); *In re Grand Jury Investigation No. 78-184 (Sells)*, 642 F.2d 1184, 1190 (9th Cir. 1981); *J. R. Simplot, Co. v. United States*, 77-1 USTC (CCH) par. 9416, at 86,197 (9th Cir. 1976), *withdrawn as moot on other grounds*, 77-2 USTC (CCH) par. 9511 (9th Cir. 1977); *In re April 1956 Term Grand Jury, supra* note 31, at 271. *See also In re April 1977 Grand Jury Proceedings*, 506 F.Supp. 1174, 1181-82 (E.D. Mich. 1981); *In re Application of the United States for an Order Pursuant to the Provisions of Rule 6(e), Federal Rules of Criminal Procedure*, 505 F.Supp. 25, 27 (W.D. Pa. 1980); *In re Grand Jury Investigation*, 414 F.Supp. 74, 76 (S.D.N.Y. 1976). *See generally* Pickholz, *supra* note 33; *See also* Note, *Administrative Agency Access to Grand Jury Material Under Amended Rule 6(e)*, 29 Case W. Res. 295, 320 (1978) (hereafter cited as "Note, *Administrative Access Under 6(e)*"); and Note, *Administrative Agency Access to Grand Jury Materials*, 75 Colum. L. Rev. 162, 166-67 (1975) (hereafter cited as "Note, *Administrative Agency Access to Grand Jury Materials*").

[37] Quoted from Point III, A of *In The Matter of Grand Jury Proceedings, Miller Brewing Co., supra* note 36 citing to: *United States v. Proctor & Gamble, supra* note 36, at 683; *In re April 1956 Term Grand Jury, supra* note 31, at 271 and *United States v. Doe*, 341 F.Supp. 1350, 1352 (S.D.N.Y. 1972). In *Doe* the court stated at 1352:

"It is my conclusion . . . that the grand jury's role is properly confined, and amply respected, when it is held empowered to conduct investigations that are *in their inception exclusively criminal.* To hold otherwise--to confer court approval upon the kind of concurrent criminal and civil inquiries projected by the instant application--would expand the already awesome powers of the grand jury beyond tolerable limits."

. . . .

"It is true, of course, that many or most areas of law enforcement involve the alternate or cumulative prospects of both civil and criminal proceedings by the Government. *But this is no justification for allowing the intentional use of a strictly criminal weapon (with a potency supposedly justified by its grave function) for the combined purposes.*" (Emphasis added)

marshalling yard *to gather evidence for later civil use.*[38] It is this *good faith*, and federal agency influence upon it, that the courts must monitor through Rule 6(e).

The constitutional mandate and potential for misuse of the grand jury system are the touchstones against which government arguments in support of easy government access to grand jury materials for purely money collection purposes under Rule 6(e) should be tested. The agency activities in this case and similar cases discussed under POINT B provide a benchmark of experience against which that test can be evaluated. In this light respondents briefly review in this ARGUMENT I the historical evolution of the grand jury as a constitutional shield against arbitrary and oppressive governmental action in the investigation of possible crimes, how that shield has significantly eroded in recent years with increased agency participation, why the IRS and other federal agencies would prefer to use the grand jury as a discovery tool and an evidentiary marshalling yard for civil as well as criminal prosecution, how they have increasingly proceeded to use it for those purposes, and the danger that such use presents to the independence of the grand jury and the doctrine of secrecy.

A. The Grand Jury Evolved As A Constitutional Shield Against Government Abuses And Is Not A Tool For Gathering Evidence For The Prosecution Of Civil Cases

The grand jury first dates back to the Assize of Clarendon issued by Henry II in Britain in 1166. Its initial purpose was to investigate criminal behavior on behalf of the Crown. In the late seventeenth century the role of the grand jury as a bulwark or *shield* against arbitrary and oppressive governmental action became predominant.[39] It was during this same time

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[38] When a grand jury has completed its accusatory function, its *ex parte* compulsory process cannot continue to be used for the "dominating purpose of preparing an already pending indictment for trial" [*United States v. Dardi*, 330 F.2d 316, 336 (2d Cir.), *cert. denied* 379 U.S. 845 (1964); *see also* 8 Moore's Federal Practice par. 16.08 (2d ed. Sept. 1979 rev.); Hassett, *Ex Parte Pre-Trial Discovery: The Real Vice of Parallel Investigations*, 36 Wash. & Lee L.Rev. 1049, 1066 (1979)].

It seems therefore axiomatic--even without the express admonition in *United States v. Proctor & Gamble, supra* note 36--that this powerful *ex parte* compulsory process cannot be used for the purpose of civil discovery to marshall evidence in preparation for a civil proceeding and to circumvent the established rules of civil discovery. Coupling this with this Court's clear warning in *Proctor & Gambie* (*Id.* at 683) that "if the prosecution were using [criminal procedures to elicit evidence in a civil case]. . . . it would be flouting the policy of the law" would seem to abrogate any question on this point.

[39] Frankel, *The Grand Jury - An Institution On Trial*, 6-9 (1977); Note, *Administrative Agency Access to Grand Jury Materials, supra* note 36, pages 163-164 at n. 13. The words "***arbitrary and oppressive governmental action***" are taken from *United States v. Calandra*, 414 U.S. 338, 343 (1974).

that the concept of grand jury secrecy evolved as a protection for its deliberations from abuses of the Crown.[40] In the early colonial days of America the role of the grand jury as a "shield" against government abuses became predominant as a result of resistance to British authoritarian rule.[41] The result was the incorporation into the Bill of Rights as a part of the fifth amendment the provision guaranteeing a grand jury indictment before prosecution for infamous and capital crimes. The fifth amendment protection of the grand jury as a "shield" against government abuses was early recognized in legal commentaries.[42]

This Court has long recognized the constitutional purpose of the grand jury as an independent inquest of the people, the independence of which has been long assured by the common law doctrine of secrecy.[43] This Court

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40 The hallmark case in England in 1681, which is hailed as initiating the grand jury as a shield against government oppression, was also the case that underlined the importance of grand jury secrecy. In this case two Protestants, Anthony, Earl of Shaftsbury, and Stephen Colledge, were under investigation by King Charles II for treason. Notwithstanding Charles II's pressure to have the grand jury hearing in public, the grand jury resisted and conducted the proceedings in private, resulting in a decision not to indict. (Pickholz, *supra* note 33, at 1029).

41 The requirement of indictment by grand jury has a history in Colonial America predating the constitution. The earliest documentary protection afforded by grand jury indictment (referred to as a "grand inquest") was contained in the New York Charter of Liberties (1683), Colonial Laws of New York (1894), Vol. I at 111-116 reprinted in 1 Schwartz, *The Bill Of Rights: A Documentary History*, 163 (1971) (hereafter cited as "Schwartz"). The first constitutional guarantee of grand jury indictment was found in the North Carolina Declaration of Rights (1776) (reprinted in 1 Schwartz 286). The use of the grand jury as a bulwark against British royal excesses was displayed in 1735 when the grand jury in New York refused to indict a newspaper editor for criminal libel, notwithstanding demands of the British Crown, J. Edwards, *The Grand Jury*, 32 (1906). The grand jury was highly esteemed when the colonies formed a nation, and in fact it had often been the clarion of anti-authoritarian, revolutionary sentiment directed against the British Crown, L. Clark, *The Grand Jury*, 19 (1975). While the constitution of the United States as originally adopted did not contain a guarantee of grand jury indictment, the Bill of Rights, ratified by the states in 1791, did contain the present form Constitutional guarantee that appears in the fifth amendment. The present form of the amendment is actually in a form more protective than was originally presented by James Madison to Congress in 1789 (*See* 2 Schwartz, 1027, 1053, 1117, 1154, 1165).

42 *See, e.g.*, 3 Story, *Commentaries On The Constitution Of The United States*, 658 (1833).

43 *See Douglas Oil Co. v. Petrol Stops Northwest, supra* note 31, at 218; *United States v. Proctor & Gamble Co., supra* note 36, at 681; *United States v. Johnson*, 319 U.S. 503, 513 (1943); *Costello v. United States*, 350 U.S. 359, 362 (1955); *Ex Parte Bain*, 121 U.S. 1, 12 (1886).

has consistently noted that the grand jury with its extraordinary powers of discovery is to be used to investigate criminal law violations and to act as a "protector of citizens against arbitrary and oppressive governmental action" [*United States v. Calandra*, 414 U.S. 338, 342-44 (1974)].[44] Were evidence to be marshalled for a civil case under grand jury subpoena, this Court has already stated that such action would be "*flouting the policy of the law*" [(emphasis added) *United States v. Proctor & Gamble*, 356 U.S. 677, 683 (1958); see also notes 37 and 38 *supra*].

B. Recent Cases Demonstrate The Extent To Which The Independence Of The Grand Jury As A Constitutional Shield Has Become Seriously Eroded By Its Use As An Evidentiary Marshalling Yard

It has become generally recognized that the prosecutor--originally restricted from the presence of the grand jury--now literally conducts the grand inquest.[45] That the grand jury needs technical assistance from

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[44] "In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by a 'presentment or indictment of a Grand Jury.' *Cf. Costello v. United States*, 350 U.S. 359, 361-362 (1956). The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. *Branzburg v. Hayes*, 408 U.S. 665, 686-687 (1972)." 414 U.S. 342 at 342-43.

[45] *See, e.g., Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F.Supp. 1098 (E.D. Pa. 1976). The court specifically found that: ". . . [I]n broad general terms our findings of fact fairly and substantially support the claim that *the grand jury is essentially controlled by the United States Attorney and is his prosecutorial tool.*" . . . [although] "the grand jurors themselves do play *some* role in the decision making process." *Id.* at 1119 (emphasis added).

As stated by the California Supreme Court in superimposing a post-indictment hearing procedure:

"'Today, the Grand Jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury.' . . . 'The contemporary grand jury investigates only those whom the prosecutor asks to be investigated, and by and large indicts those whom the prosecutor wants to be indicted.' . . . '*It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive.*'"

(Footnote 45 continued on page 24)

governmental agencies to deal with sophisticated economic crimes is not disputed, but the grand jury itself *must* remain independent of that agency assistance and not merely "rubber stamp" its recommendations;[46] otherwise, this constitutional "shield" with its sweeping discovery powers converts to a sovereign "sword" held to the hearts of its people.

A growing number of lower court decisions graphically demonstrate the predominant role the federal agencies now play in grand jury investigations and the extent to which they, as part of the Executive branch, have converted this "shield" into a "sword" used for the dual purpose of criminal investigation and the marshalling of evidence for both criminal and civil prosecution.[47]

In a tax court case, *Sam Cohen*, 42 T.C.M. (CCH) 312 (1981), the court was obviously incensed at the callous disregard of Rule 6(e) by both the IRS and the offices of the United States Attorney. While assisting the AUSA with a grand jury investigation the IRS had initiated, IRS personnel obtained and utilized grand jury materials for civil tax collection purposes without any prior Rule 6(e) disclosure order and failed to disclose this to the district court after the fact when Rule 6(e) disclosure orders were sought *ex parte*. Based on a thorough and well-reasoned analysis of the history, purpose and application of Rule 6(e), the court actually suppressed the illegally obtained evidentiary materials from being used in the proceedings. The court, at 323, expressed concern with regard to the growing agency assistance being provided to the prosecutor and the temptation for authorized assisting personnel to utilize informaton presented to the grand jury in their own civil investigation.

A case that discusses in detail this direct agency participation that occurred under only nominal supervision is *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F.Supp. 1098 (E.D. Pa. 1976). In that case the court made specific findings and observations on the subject of agency participation as follows: [1] Voluminous records obtained under grand jury subpoena were required to be physically delivered to, and were retained at, offices of the IRS (*Id.* at 1113, 1123 & 1126). [2] The "United

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(Footnote 45 continued)

(Quoting Justice Douglas), *Hawkins v. Superior Court of City and County of San Francisco*, 22 Cal.3d 584, 590-91; 150 Cal.Rptr. 435; 586 P.2d 916 (1978) (*See also* numerous treatises therein cited).

46 *See Wood v. Georgia*, 370 U.S. 375, 390 (1962); *United States v. Dionisio*, 410 U.S. 1, 23 (1972) (Douglas, J., Dissenting).

47 In addition to the cases hereafter discussed in more detail *see, e.g., In re Grand Jury Subpoenas April 1978, at Baltimore*, 581 F.2d 1103 (4th Cir. 1978); *In re April 1956 Term Grand Jury, supra* note 31; *United States v. Doe, supra* note 37.

States Attorney did not supervise the activities of all IRS Agents working on the case . . .", (*Id.* at 1126, see also 1113, 1123). [3] The U.S. Attorney apparently did not know the number of IRS personnel involved or their identities (*Id.* at 1113, 1123, 1126). [4] No oath of secrecy was administered to any of the IRS personnel, although they were made aware of the secrecy requirements (*Id.* at 1113, 1125). [5] The IRS Manual instructions for Special Agents (§ 624) were inadequate as to the subject of grand jury secrecy (*Id.* at 1126 n. 51). [6] The court acknowledged that as a practical matter the information and documents that passed through the agency do not "lose their viability" when beyond the immediate control of the U.S. Attorney (*Id.* at 1121). [7] The court recognized that the IRS made field investigations while assisting the grand jury using procedures akin to an administrative investigation--even to the point of mistakenly issuing an IRS summons (*Id.* at 1110-11, 1118 n. 33). [8] The court also recognized that multiple grand juries were used[48] with "no symmetry or regularity" and that no accurate records were kept; and the U.S. Attorney could not advise the court what evidence was obtained under, or put before, which grand jury (*Id.* at 1111 n. 24). [9] The actual submissions to the grand jury were found to be "few and far between" (*Id.* at 1112 n. 24); and, it had been a long drawn out investigation (*Id.* at 1117).

The district court was obviously troubled by all that occurred, but in a lengthy opinion it explained away its findings, and by its standards found no ultimate bad faith or abuse of the grand jury process.[49] The court seemed reluctant to take direct action and took the position it lacked the power as a *single* judge to do any more than *suggest* to the prosecutor specific procedures it strongly believed the U.S. Attorneys should implement (*Id.* at 1117, 1120, 1128) and announced it would circulate its opinion to apprise other courts (*Id.* at 1128). At the same time it clearly recognized the courts' broad supervisory powers over the grand jury investigation (*Id.* at 1117) and actually issued three Rule 6(e) orders[50] under which it noted that all of the activities complained of had occurred (*Id.* at 1120).

This "expansion" of the agency role in grand jury proceedings continues apace. Consider in summary form referenced to the STATEMENT the

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48 Four different grand juries were sitting at one time.

49 The court proceeded from the premise that a "presumption of regularity" attaches to grand jury proceedings (*Id.* at 1115) which apparently it did not find overcome.

50 Rule 6(e) was not amended to permit agency personnel to assist the U.S. Attorney without a 6(e) order until after this decision. These 6(e) orders the court issued *during* the investigation authorized both criminal *and civil* use by the agency of grand jury materials (*Id.* at 1120).

strong *prima facie* showing as to the scope of the same agency's involvement in this case, which respondents contend amounted to an investigation under the auspices of the U.S. Attorney's office -- literally to the excluson of the grand jury. The IRS initiated the open-ended grand jury investigation when its own administrative investigation became judicially stymied (STATEMENT, Part A); it then became directly and actively involved in that investigation with the *same* IRS agents (STATEMENT, Part B) to the point it literally conducted it to the exclusion of the grand jury by misappropriating the grand jury subpoena power with the assistance of the U.S. Attorney's Office to intimidate virtually all of the witnesses into appearing before IRS agents "voluntarily" to be interrogated under oath (STATEMENT, Part B), and it often further intimidated many of the same witnesses with that subpoena power inducing them into waiving fifth amendment rights and to sign sworn statements and affidavits (STATEMENT, Part B); it then disseminated the grand jury materials and summary reports of the investigation results up the chain of command to numerous other IRS personnel for review and evaluation (STATEMENT, Part C); it then made the decision to seek an indictment and prosecute and recommended such to its legal enforcement arm, the Tax Division of the Department of Justice which in turn so recommended to the U.S. Attorney (STATEMENT, Part C); then, to obtain indictments and to cap off this unbroken string of active grand jury involvement, the IRS agents provided literally *all* of the testimony (with the help of one other government employee) in summary hearsay form to a totally different grand jury that had *no independent familiarity* with the case, witnesses or facts whatsoever (STATEMENT, Part D); to reap the benefit of their efforts the IRS for civil collection purposes induced the U.S. Attorney to require, *as a condition of the plea bargain*, that respondents Sells and Witte execute a detailed 19 page admission of tax liability scheduling every fraudulent deduction from which each taxpayer's liability can be calculated for each investigated tax year--*all carefully prepared from subpoenaed grand jury materials, eighteen months before any 6(e) order was ever sought by the IRS* (STATEMENT, Part E-1; *see* C.R. 495-514);[51] then, after obtaining the desired indictment, conviction, and

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[51] The guilty plea was to Title 18 U.S.C.A. § 371 (West 1966) which is conspiracy tax fraud. The only requirements necessary to support such a plea are: (1) two or more individuals agreeing together to perform an illegal act; and, (2) one material act taken in furtherance of the scheme [*United States v. Feola*, 420 U.S. 671, 694 (1975); *United States v. Shoup*, 608 F.2d 950, 956 (3d Cir. 1979)]. It is not necessary to establish either that harm resulted or its extent. Further, no need exists for the very detailed calculations and schedules set forth in the agreed Statement of Facts for either preparation of the presentencing report or for later use by the Parole Board, as a general description of the

(Footnote 51 continued on page 27)

agreed statement, it sought to put the "icing on the cake" by obtaining a Rule 6(e) order for the release of all the massive evidence it had marshalled with the use of the grand jury subpoena powers (STATEMENT, Part F); finally it turned loose on respondents the *same* IRS agent to *collect* taxes under regular administrative procedures that had been deeply involved from the initial civil administrative audit right through the grand jury investigation and indictment (STATEMENT, Part F n. 29). These procedures were instituted under several IRS manual sections *which later came under criticism by both the Judiciary and the Department of Justice and were withdrawn.*[52]

The instant case demonstrates a clear expansion of the agency role as compared to *Hawthorne*. All but points [3] and [7] discussed as to *Hawthorne* ALSO EXIST IN THIS CASE.[53] ***But, even as to point*** **[3]**: while the U.S. Attorney in this case seems to have finally pulled together in numerous government personnel affidavits the names of the IRS personnel that admittedly worked on the materials, it would appear he did not really know how many there were or who they were until respondents forced the issue with a grand jury abuse motion in the criminal case requiring the government to file its affidavits in opposition. ***And, even as to point*** **[7]**: it would appear that in the instant case the IRS Special Agent "voluntary" interrogation approach (*after subpoena*) was substituted by design for the field investigation procedures used in *Hawthorne*, which respondents contend constitutes by itself serious misuse of the grand jury's extraordinary subpoena powers.

But, this case goes substantially beyond the facts in *Hawthorne*. The agency control over the grand jury investigation compared to *Hawthorne* is even more apparent as *thirteen separate additional factors* that did not exist in *Hawthorne* demonstrate. Continuing serially from the common

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(Footnote 51 continued)

scheme, conclusionary statements of the criminal activity and ultimate figures would have sufficed. Respondents submit that the precise detail of this agreement, down to specifying every single improper deduction, was "crafted" by the IRS to constitute an *admission of civil tax liability for later civil use* in the determination and collection of back taxes, penalties and interest due from each defendant taxpayer.

52 *See* discussion under ARGUMENT I, C *infra*, *and see* notes 3 and 12 and accompanying text *supra*.

53 With the arguable exception that in this case subpoenas were not issued to deliver records to the IRS office directly as occurred in *Hawthorne* Point [1], but such materials and an analysis of them were instead disseminated in this case to the district and regional offices by the "assisting" IRS agents during the open-ended investigation. (*See* STATEMENT, Part C *supra*).

factors identified in *Hawthorne*: [10] It was the IRS in this case that initiated the open-ended grand jury investigation after being "stymied" in the courts in its administrative proceedings (STATEMENT, Part A; *Hawthorne* facts were to the contrary).[54] [11] In this case the *same* IRS agents participated in the grand jury investigation as were conducting the prior administrative investigation (STATEMENT, Part A; no equivalent in *Hawthorne*). [12] In this case *no* 6(e) orders were obtained for the assistance of Agents Wordell and Rogers though they were enlisted to assist the grand jury over one year before Rule 6(e) was amended (STATEMENT, Part C; In *Hawthorne*, the court took great comfort in its three 6(e) orders). [13] The very first grand jury subpoenas issued were for the very same records that the IRS had been judicially "stymied" in obtaining under its administrative summonses (STATEMENT, Part A n. 7; no equivalent in *Hawthorne*). [14] In this case virtually all of the witnesses subpoenaed were diverted to "voluntary" interrogation by a Special Agent of the IRS and did not testify before the grand jury (STATEMENT, Parts B & D; an aggressive expansion of the field investigation approach used in *Hawthorne* by making direct use of the grand jury subpoena power to conduct its investigation to the practical exclusion of the grand jury). [15] In this case several of these same witnesses were intimidated by use of the subpoena power into "voluntarily" waiving their fifth amendment rights in testifying before a special agent, rather than the grand jury, and in signing affidavits prepared by the special agent in a form acceptable to him (STATEMENT, Part B; no equivalent in *Hawthorne*). [16] In this case subpoenas appear to have been issued when no grand jury was assembled to investigate *this* case and for the purpose of diverting witnesses before a Special Agent of the IRS (STATEMENT, Part B, text accompanying n. 14 and STATEMENT Part A, last Par.; no equivalent in *Hawthorne*). [17] No 6(e) orders were obtained for the use of private stenographers to take down the "voluntary" interrogations by IRS Agents Wordell and Rogers conducted under grand jury subpoena (STATEMENT, Part C n. 16; no equivalent in *Hawthorne*). [18] The IRS made the *real* decision to prosecute at its District and Regional offices based on its *own* review of the evidence (STATEMENT, Part C; premature in *Hawthorne*). [19] The *only* testimony presented to the grand jury to obtain the indictment was the hearsay testimony of government agents summarizing their view of the

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[54] The IRS has demonstrated a long history of this practice and it has been the subject of considerable litigation below involving complaints of dual purpose abuse. *See, e.g., In re Grand Jury Subpoenas, April 1978, at Baltimore, supra* note 47; *In re J. R. Simplot Co., supra* note 36; *In re April 1956 Term Grand Jury, supra* note 31. The practice of the IRS switching gears from an administrative investigation to a grand jury proceeding is demonstrated in *In re April 1977 Grand Jury Proceedings, supra* note 36; *U.S. v. Dondich*, 460 F.Supp. 849 (N.D. Cal. 1978).

evidence and of the testimony of all the "witnesses" (STATEMENT, Part D; premature in *Hawthorne*). [20] The grand jury had no real independent evaluation of the evidence and facts but were essentially directed by the predetermination of the IRS and its selective presentation (STATEMENT, Part D; premature in *Hawthorne*). [21] As a plea bargain condition, defendants were required to execute a very detailed and itemized Agreed Statement of Facts scheduling and explaining every false deduction from which their exact tax liability could be calculated--prepared by the IRS directly from grand jury materials without any 6(e) order (STATEMENT, Part E-1; no equivalent in *Hawthorne*). [22] The *ex parte* compulsory process of the grand jury was used to prepare the entire IRS civil case and obtain all of the necessary evidentiary materials. These evidentiary materials, which go far beyond the scope necessary to establish grounds for indictment, were marshalled by this IRS sponsored investigation sufficient to prepare the detailed Agreed Statement of Facts to the last tax dollar (STATEMENT, Part E-1 *supra*; C.R. 495-514; premature and not developed in *Hawthorne*). This is further corroborated by CAUSA Reese's own affidavit which states:

> "No attempt was made to present to the indicting grand jury all of the documentary material obtained through the previous grand jury. *Literally thousands of documents had been obtained, the majority of which were found not to be related to the criminal case.* . . . The testimonial evidence developed before the previous grand jury was hardly extensive, and *it was in large measure unrelated to the transactions forming the basis for the criminal charges.*" (emphasis added C.R. 322 lines 20-30)

The combined agency activities common in both this case and *Hawthorne* plus those additional enumerated activities involved in this case **demonstrate that the control of the grand jury investigation did not rest with the grand jury but instead with the "assisting" agency.**

From the activities in *Hawthorne* the agency's role in this case was merely the next logical step down the path toward agency domination of grand jury investigations dealing with economic crimes. Is it really hyperbole to suggest that the grand jury was the *least* necessary of all of the participants? Was there little else really sought but its subpoena power and its "rubber stamp"? In the final analysis, "*who* really was assisting *whom*?[55] But, the IRS "designs" on the use of the grand jury as a civil discovery tool and an evidentiary marshalling yard have recently become even more brazen. Apparently now, if the IRS can support at all the theory of

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55 One is reminded of three old clichés: "The camel's head under the tent"; "The fox guarding the chicken coop"; and, "The tail wagging the dog".

possible criminal intent, it will use that rationale for initiating a grand jury investigation to obtain the advantages of its subpoena power. Consider the recent decision of *In re April 1977 Grand Jury Proceedings (General Motors)*, 506 F.Supp. 1174 (1981), on appeal to the Sixth Circuit No. 80-81182. The case is more fully briefed by General Motors Corporation as *amicus curiae* in both this case and in *United States v. Baggot*, No. 81-1938. In summary respondents note that the IRS converted an administrative audit into an open-ended grand jury investigation and subpoenaed up to 300,000 pages of documents all analyzed by at least 16 IRS personnel and subpoenaed 100 witnesses to appear before the grand jury to be interrogated by a specially appointed IRS attorney. What is exceedingly unusual in *General Motors* is that the district court *expressly found* that the IRS had converted an administrative audit into a grand jury investigation with one of its principal purposes being "*to create a pool of data to be used for civil purposes upon the filing of a 6(e) disclosure motion*" (emphasis added *Id.* at 1177). Quoting from the government's own brief the court demonstrated that the IRS wanted the grand jury materials because it doubted it could easily duplicate the investigation. In other words it marshalled, through use of the *ex parte* compulsory process subpoena power of the grand jury, materials it would have been more work to obtain using its statutory discovery powers. The court questioned the good faith intent of the IRS in even having a real criminal purpose and noted it was "*improbable that the grand jury investigation would have been conducted for criminal purposes alone*" (emphasis added *Id.* at 1177). Nevertheless, the court found goof faith on the strength of the mere "***possibility*** that a crime of major dimensions might be uncovered by the grand jury" (*Id.* at 1177, emphasis added). In reaching this conclusion the court noted that:

> "It would be an *unusual case* in which the government was investigating a potentially large deficiency when it could not make a convincing argument that it wished to investigate the possibility of crime." (*Id.* at 1177, emphasis added)

Can the constitutional protection of the Grand Jury have eroded so far that it can now be used as a "sword" with callous disdain **by an agency of the very sovereign against who's oppression it was intended to buffer?**

An unpublished Ninth Circuit opinion that has become well recognized and often cited by legal commentators for its analytical precedence on the subject of agency involvement without close court supervision and the dangers it portends is the decision of *In re J. R. Simplot Co.*, 77-1 USTC

(CCH) par. 9146 at 86,195 (9th Cir. 1976).[56] *Simplot* like *Hawthorne* was decided a few months prior to the 1977 amendment to Rule 6(e) permitting the U.S. Attorney under the new subsection 6(e)(3)(A)(ii) to designate such government personnel as he deems necessary to assist him in the grand jury criminal investigation.[57] *Simplot* is similar on its facts to this case and demonstrates IRS procedures employed similar in many respects to both this case and *Hawthorne*. Like this case (but unlike *Hawthorne*), the IRS converted an administrative investigation into an open-ended grand jury investigation ultimately involving 24 IRS personnel. Like *Hawthorne*, *ex parte* Rule 6(e) orders had been obtained during the investigation permitting IRS personnel access to grand jury materials both to assist the U.S. Attorney and for civil tax use. No such orders were obtained in this case. No mention is made in *Simplot* (or *Hawthorne*) of any similar "voluntary" interrogation procedures that is one of the abuses respondents complain of here as noted by the Ninth Circuit below (Pet. 3a-5a n.2). The *Simplot* opinion demonstrates a sensitivity to the constitutional purpose and threatened independence of the grand jury under the fifth amendment and sounded the "clarion bell" of the potential for abuse that the introduction of unsupervised agency participation brings. It left no question as to what the court considered to be the proper priorities:

> "Rule 6(e) provides to grand jury materials for 'attorneys for the government for use in the performance of their duties.' Indiscriminate expansion of 'attorneys for the government' to include IRS personnel whenever it suits the convenience of the United States Attorney would blur the distinction between criminal and civil investigations. *Blurring this distinction gives the agency 'a much greater incentive to try to persuade the grand jury to investigate matters which are beyond its proper role but of interest to the agency.'* (citation deleted). . . ."
>
> ". . . [t]he grand jury is a constitutional entity under court supervision, *not a tool available for Executive branch purposes.* (citation deleted)."

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56 As cited in note 36, *Simplot* was withdrawn on other grounds – as the result of a motion made in connection with a plea bargain agreement. It was, however, cited in the Senate Report 95-354 *supra* note 35, at 7. The government argued below that this case has no precedential value since it was withdrawn. We contended it was valid as analytical precedence. Since the issues of this case are now before this Court, to which all lower court opinions connote only judicial persuasion, we additionally cite this opinion for the same purpose.

57 The court was well aware of the Supreme Court's proposed amendment to Rule 6(e) (*See Simplot, supra* note 36, at 86,198-99 n. 15).

> "The grand jury has powers reaching far beyond those of the IRS. The justification for these powers is the *singlemindedness* of the grand jury's function in accusing individuals of criminal acts." (emphasis added at 86,197-98).

Simplot further discussed the violence that agency procurement of grand jury materials under Rule 6(e) does to the safeguards built into our civil adversary system and suggests standards and procedures courts should implement where the technical capability of agency personnel are required to permit the grand jury to fulfill its criminal investigation functions.[58]

The independence and secrecy of the grand jury come into serious question when 24 IRS personnel become involved and privy to the investigation as in *Simplot*, or when at least 19 IRS personnel (plus a number of local private stenographic reporting firm personnel) become involved and privy as in this case, or when an IRS attorney assumes the interrogating role before the grand jury by special appointment assisted by 16 IRS agents as in *General Motors*. This level of agency involvement itself was construed in *Simplot* to be a danger flag as to the proper utilization of the grand jury. Certain additional "flags" have been suggested as good indicators as to whether the grand jury is being used by an agency for the additional purpose of civil discovery. All 6 of the flags suggested by one legal commentator have flown in this case[59], plus several additional ones respondents have itemized above.

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[58] Respondents further suggest that the *Simplot* opinion survives in logic the 1977 amendment to Rule 6(e). It may even be said that it contains déjà vue logic that brings into question the constitutionality of the new clause 6(e)(3)(A)(ii) that now permits agency personnel, "deemed necessary" *in the sole judgment of the prosecutor*, direct participation in grand jury proceedings without prior court order or meaningful court supervision (*Simplot, supra* note 36, at 86,198-99 n. 15).

[59] *See* Cys & Rezneck, *The Sharing of Information Among Government Entities During Parallel Grand Jury and Administrative Agency Investigations*, (hereafter cited as *Grand Jury And Administrative Agency Investigations: The Criminal And Civil Implications For Corporations And Their Officers* Tab N-1, 22-23 (1978). The authors suggest and discuss six flags as "indicators" whether the agency is using the grand jury as a discovery tool:

a. Agents inspecting secret grand jury materials who have not been authorized pursuant to Rule 6(e) or whose identity has not been reported in writing to the court.

b. Presence of grand jury agents who were previously interested in, or who conducted, agency investigations.

c. Evidence that unauthorized agency personnel have access to the area where secret grand jury material are stored.

d. Reports that prosecutors do not keep a 6(e) docket or other detailed internal records concerning the handling of subpoenaed materials.

(Footnote 59 continued on page 33)

It is not enought to say, as can be said in this case, that the "targets"--having entered guilty pleas to at least one count of an eleven-count indictment--can't be said to now complain that the grand jury was used for an improper purpose, because the *results* vindicate the investigation. *Results* are not the criteria by which cnstitutional standards are measured.[60] Obviously respondents' case might have more appeal if no plea was entered, and better yet if no "true bill" issued at all.[61] To assume from this, however, that the IRS had no dual purpose motivation and conducted no dual purpose investigation and did not use the subpoena powers of the grand jury to marshall evidence for both civil and criminal prosecution purposes would be crossing a bridge that wasn't there and contrary to what even the present state of the record demonstrates. The government's attempt to permanently broaden the *ease* by which government agencies can obtain access under Rule 6(e) must be considered in light of the growing agency involvement in the grand jury process demonstrated by the cases.

C. Federal Agencies Are Motivated To Use The Extraordinary Grand Jury Power To Marshall Evidence For Civil And Criminal Prosecution Which Constitutes An Ongoing Threat To Grand Jury Independence And Secrecy

Under the prior point respondents demonstrated the degree of agency participation and scope of its involvement that appear ongoing in the grand jury process. This point addresses the motivations the agency has to provide such extensive assistance and suggests the resulting danger to the independence of the grand jury and the doctrine of secrecy. It is respondents' contention the federal agencies such as the IRS will continue to be

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(Footnote 59 continued)

e. Any evidence that agency personnel sworn as grand jury agents will be involved in a subsequent agency investigation.

f. Knowledge that the grand jury was begun after [the] client sued the government civilly, or after attempts to enforce agency subpoenas were unsuccessful.

60 *Cf. Wong Sun v. United States*, 371 U.S. 471, 487 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Rogers v. Richmond*, 365 U.S. 534, 541 (1961) (Holding that confessions obtained by threats or inducements must be excluded because "the methods used to extract them offend an underlying principle in the enforcement of our criminal law . . .").

61 The fact that respondents have pleaded guilty to one count of the criminal complaint does not collaterally estop them from raising issues of prosecutorial misconduct in subsequent civil proceedings since these issues were not "distinctly put in issue and determined" in the criminal case. *Williams v. Liberty*, 461 F.2d 325, 327 (7th Cir. 1972). *See also Brown v. Felsen*, 442 U.S. 127, 139 n. 10 (1979) where this Court held that collateral estoppel only applies to questions *actually* and *necessarily* decided in a prior suit.

highly motivated to resort to the "open-ended" type grand jury investigations, so long as they are allowed to continue to use the grand jury as an evidentiary marshalling yard and obtain easy access to the products of such investigations under Rule 6(e).

The dramatic differences between the virtually unlimited grand jury subpoena powers and the statutorily regulated administrative discovery procedures would be answer enough to demonstrate the desire of federal agencies to resort to grand jury investigations whenever possible--so long as they can ultimately expect to reap the benefit through easy access under Rule 6(e). Without making a detailed statutory comparison of these differences, suffice it to say that grand jury subpoena powers are "extraordinary" and "awesome" by comparison to the rest of our adversary discovery procedures.[62]

To prove a wrongful intent in initiating an open-ended grand jury investigation or to prove the agency's real motivation, one faces the same problems of proof as those for intentional fraud. It usually can only be demonstrated by circumstantial evidence, as seldom does the wrongdoer openly acknowledge his secret intent. The problems are even further aggravated by the secrecy doctrine itself which denies the "target" access to determine and show the abuse.[63] But, here we have *an express declaration by the IRS as to what was its motivation* in resorting to open-ended grand

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62 A more thorough analysis and comparison of agency and grand jury subpoena powers have been made in respondents' *amicus curiae* brief filed in *United States v. Baggot*, No. 81-1938. In summary, however, respondents here observe: Under a grand jury subpoena no relevancy need be demonstrated as required under civil procedures and the grand jury can roam at will; only extremely limited procedures exist to resist a grand jury subpoena and only the most aggravated circumstances can be the basis for a court to intervene in its "supervisory" capacity; failure to obey a grand jury subpoena is itself a contempt whereas only violations of a court enforcement order under federal discovery rules can be the basis for contempt; in open proceedings the subpoena power of agencies is limited by statute whereas the grand jury subpoena power knows few bounds; agency subpoenas must be enforced by a court and the order is appealable, and discovery can be limited in Civil Proceedings under protective orders; a witness appearing before a grand jury usually does not even know the purpose, who or what is being investigated, or the nature of the testimony that will be required of him, and he can be compelled by the grand jury to waive his fifth amendment right under a grant of immunity; in civil proceedings all witnesses and parties are aware of the nature of the proceeding, who they involve and have the protection of the court whenever they seek it; perhaps the greatest single difference, however, is the right to counsel which is absolutely denied any witness in the grand jury room -- and no judge is even in attendance.

63 *In camera* review by a judge, if obtainable, is not a satisfactory solution because it permits no effective advocacy at all and is a poor substitute for the "klieg light" of our adversary system.

jury proceedings and providing assistance to the U.S. Attorney:

> "(1) Internal Revenue personnel will be authorized to act as agents of the Federal Grand Jury *under the conditions that the U.S. Attorney* or the Strike Force attorneys *will make application for and secure a Federal Rule of Criminal Procedure 6(e) order that will release all records, information and testimony obtained through the use of the Grand Jury to the Service for civil as well as criminal tax purposes.*" (emphasis added).[64]

That this "strings attached" policy has been put into practice is clear from the facts of the cases here discussed. One would not, however, expect the government to raise the threat of discontinued IRS participation in the grand jury process itself as a club to extract grand jury materials under Rule 6(e) for its civil purposes. This, however, is just what was recently inferred in another case this Court is now considering, where the Seventh Circuit noted:

> "The issue also has significant impact, the government argues, because of the practical concerns which an adverse ruling would have on IRS's future cooperation with subsequent grand jury tax investigations if subsequent disclosure for the civil or other IRS purposes is restricted." *In re Special Feb. 1975 Grand Jury (Baggot)*, 662 F.2d 1232, 1236 (7th Cir. 1981)); *cert. granted, United States v. Baggot*, No. 81-1938.

Another Internal Revenue Manual section in force when the IRS instigated the "open-ended" grand jury proceedings in this case that commenced in August 1976 [STATEMENT, Part A] and which section was amended in the flurry of 1977 telegrams and manual supplements after judicial and Department of Justice criticism (*See* nn. 4 and 12 *supra*) was Section 4565.(10)(4) which stated:

> "*Examiners may have occasion to inspect sensitive documents, i.e.,* FBI reports, *Federal Grand Jury proceedings*, wire tapping transcripts etc., which as a rule are in custody of Intelligence. No copies of these documents should be made for work paper files, however, *in the event these types of sensitive documents are required to sustain a proposed audit adjustment, then pertinent*

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64 IRS Manual Sec. 1272.(10) 70(1); repealed July 29, 1977 by Manual Supplement - 9G-61 Sec. 2.02, P. 29,717. This section was quoted in *Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 92-93 (1977), at 152 (hereafter cited as "*Hearings*").

> *excerpts may be made and retained in work papers.* No reference to specific agencies should be made." (emphasis added).

This instruction to "Examiners" was amended by Section 5.02 in a July 29, 1977 manual supplement (C.R. 168) when the grand jury investigation in this case had already progressed for one year. Obviously, the Department of Justice had become aware just how much the IRS had been disregarding the secrecy mandate of the constitutional grand jury codified in Rule 6(e). The July 29, 1977 Manual Supplement itself acknowledges that the Department of Justice was extremely concerned:

> "The Department of Justice voiced the position that the uncooperative witness procedure and the debriefing procedure *were not sustainable.* They concluded that the uncooperative witness procedure is improper in that *control of the investigation does not remain within the authority of the Grand Jury.* They further concluded that the debriefing procedure under IRM 9268 is improper in that *it may be construed to be a device used to improperly obtain Grand Jury material for civil purposes.*" (At Sec. 2.02, C.R. 167).

The term "uncooperative witness procedure" included the § 9267.4 "open-ended" Grand Jury Proceedings quoted by the court below which were later withdrawn (*See* Pet. 3a n. 2, *and see* STATEMENT, Part A n. 4 *supra*). "The debriefing procedure under IRM 9268" is the section quoted in Footnote 12 *supra*, and as quoted by the court below (Pet. 4a-5a continuation of n. 2) which it considered "similar" to the *voluntary* witness interrogation undertaken by Agent Wordell using grand jury subpoenas in this case (STATEMENT, Part B). The amendment of the "instruction" Section 4565.(10)(4), and other instructions amended or withdrawn, obviously resulted from this same Department of Justice criticism. These interrelated manual instructions irrefutably demonstrate the motivation of the IRS to convert their requested "assistance" in grand jury proceedings *into a dual purpose investigation to serve their primary function to collect taxes.*

Unlike a Rule 6(e) case where no "true bill" issued at all, and unlike *Hawthorne, Simplot, General Motors* or any other case of which respondents are aware, with the possible exception of *Cohen, supra*, this case provides the Court with the *complete picture (full circle)* of agency involvement--from conversion by the agency of a "stymied" administrative investigation into a grand jury investigation, its exercise of *essential control* over that investigation, the obtaining of an indictment solely by its *own agent's testimony*, the obtaining of a plea bargain conviction

expressly conditioned upon defendants executing an admission of tax liability (the Agreed Statement of Facts), the later obtaining of a Rule 6(e) order for all of the grand jury materials *wholesale*, and finally the agency reverting to its "regular" tax collection function by using the *same* IRS agent, now fully educated through his experience with the secret grand jury investigation, who has been *fully armed* with the executed admission (the Agreed Statement of Facts) and all of the grand jury materials released *wholesale* under the Rule 6(e) order. If this case does not demonstrate the motivation of the IRS to use the grand jury subpoena power for civil discovery and to marshall evidence for the later release under Rule 6(e) to collect taxes while "assisting" the grand jury with its criminal investigation function, respondents submit it would be an exercise in total futility for anyone at anytime to *ever* try to prove it in any case--particularly when the picture is less complete, such as in *General Motors* where no "true bill" was issued at all.[65]

Human nature must be totally ignored to assume that the IRS, whose sole function is the collection of taxes, is merely doing *pro bono* work[66] for the grand jury. It has an "axe to grind" and even a *vested* interest in the outcome.[67] *It would be difficult to "conjure up" a more biased and insidious participant to insert directly into this constitutional function without court supervision.*

While in this case the Court is considering the additional Rule 6(e) proceeding initiated by the Civil Division on behalf of the Navy and not that initiated by the IRS, the real question is whether the secrecy doctrine and the purpose of the fifth amendment is properly served if *any* branch of government reaps the benefits derived from the government's improper

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65 Not only are the manifestations of intent to use the grand jury for civil discovery not nearly so obvious or complete as in a case such as this where a "true bill" issued and the IRS procedures have travelled "full circle"; but, one who raises the civil discovery abuse issue where no indictment is ever issued invariably faces the following judicial logic:

"It is true that no indictment was returned in the present case. But that is no reflection on the integrity of the prosecution. *For all we know, the trails that looked fresh at the start faded along the way.* What seemed at the beginning to be a case with a criminal cast apparently took on a different character as the events and transactions were disclosed." *United States v. Proctor & Gamble, supra* note 36, at 683-84 (emphasis added).

66 The agency budgetary expense allocated to "assist" the grand jury must be substantial considering the manpower resources it puts into these proceedings. The agency must consider this utilization of personnel to be a very effective way to collect taxes in order to justify such personnel expenditures.

67 *See* Agreed Statement of Facts extracted from respondents Sells and Witte as part of their disposition agreement, which was an obvious attempt to make an "open and shut" civil tax case for the IRS (STATEMENT, Part D *supra*; C.R. 495-514).

use of the grand jury subpoena power.[68] Consider the potential violence to the secrecy doctrine alone that sanction of such agency activities would cause. Just how open and candid can we expect people to be if they come to know that their disclosures, supposedly made in secret to the grand jury in the interest of criminal justice, would later be easily made available under Rule 6(e) to federal agencies such as the IRS performing their civil investigation and enforcement functions? They would soon perceive that if there is to be wholesale release of the testimony they themselves might later be the subject of a civil tax audit for all sorts of real or imagined personal tax problems their testimony might touch upon. Realizing this they might, even with unfounded fear, become poor of memory and hesitate to volunteer vital information. As this Court has observed:

> "[I]n considering the effects of disclosure on grand jury proceedings, the courts must consider not only the immediate effects upon a particular grand jury, *but also the possible effect upon the functioning of future grand juries. Persons called upon to testify will consider the likelihood that their testimony may one day be disclosed to outside parties.* Fear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties. Concern as to the future consequences of frank full testimony is heightened where the witness is an employee of a company under investigation. Thus, the interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities" (*Douglas Oil Company v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979) (emphasis added)).

And, as this Court stated in *Proctor Gamble, supra*:

> "The grand jury as a public institution serving the community might suffer *if those testifying today knew that the secrecy of their testimony would be lifted tomorrow.* This 'indispensable secrecy of grand jury proceedings', *United States v. Johnson, supra,* . . . at 513, . . . must not be broken except where there is a *compelling necessity.* There are instances when that need will outweigh the countervailing policy. But they must be shown *with particularity.*" (Emphasis added, at 682).

To permit the IRS and other federal agencies access to grand jury materials in an "assisting" role without the most careful of controls

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[68] As noted in footnote 27 *supra*, and in Respondents' Reply to the Petition, the Ninth Circuit is awaiting this Court's decision before deciding the IRS 6(e) order also appealed by respondents.

maintained by the courts over the *access to* "switch" will result in a severe undermining of the secrecy doctrine as perceived by the people and impair the proper function of the grand jury.

Legal commentators have suggested that the courts should reclaim the grand jury from the clutches of the Executive and restore its constitutional function.[69] The grand jury should be restored to its intended role as an inquisitional shield for purely criminal investigation purposes rather than allowed to be converted to a *multipurpose discovery tool* and an *evidentiary marshalling yard* for both civil and criminal prosecution purposes. These are fundamentals--actually constitutional in scope--that respondents suggest need weighing in order for this Court to properly decide the specific questions the government has presented in this case.

Respondents believe that over recent years the constitutional protection afforded the people of this country under clause one of the fifth amendment has become lost in arguments over "the piffle paffle of procedure."[70] We must not lose sight of the substantive fundamentals that underly what on the surface may appear to be only procedural issues. The Court could conclude that this is not an appropriate case for addressing constitutional questions directly on the grounds the Court does not yet have the benefit of a fully tested record of findings below resulting from a proper hearing,[71] and it could construe the certified issues as being too narrow; however, even these would not be reasons for ignoring constitutional fundamentals when considering the issues presented in order to reach conclusions consistent with those fundamentals. For this reason, and with the hope this Court will agree it is time to say more, we have taken care to address these fundamentals.

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69 Note, *Administrative Agency Access to Grand Jury Materials, supra* note 36, at 178-184; Pickholz, *supra* note 33, at 1038 and 1044.

70 Attributed to Justice Benjamin Cardoza by Bernard J. Nussbaum, Esq. at *Hearings, supra* note 62, at 148.

71 However, respondents believe the excessive degree of agency participation, the agency motivation to use the grand jury as a civil discovery tool and evidentiary marshalling yard, failure to follow proper Rule 6(e) procedures, compromise of the secrecy of the grand jury, misuse of the subpoena power, continuation of the investigation without utilizing any grand jury, lack of grand jury independence, and extraction of an admission of civil liability using grand jury materials to prepare it without any Rule 6(e) order--***are all obvious from the governments own affidavits, witness interrogation transcripts, and withdrawn manual instructions that were actually applied in this case.***

D. The Allegation Of Grand Jury Abuse Is A Threshold Issue That Should Be Properly Resolved Before Any Disclosure Under Rule 6(e) Is Permitted For Civil Use

In the STATEMENT and in Part B of this ARGUMENT I respondents have made what is believed to be a strong *prima facie* showing of numerous agency activities which collectively and separately constitute practices and procedures that do violence to the constitutional grand jury system and to constitutional due process under the fourth and fifth amendments. Respondents believe they cry out for an appropriate lower court review within the context of a meaningful adversary hearing--one that is evidentiary to the extent due process requires. Any such hearing was denied by the district court and the Ninth Circuit remanded with instructions as follows:

> "Any grand jury abuse that has occurred is relevant to the district court's decision whether to disclose, and the court should consider [respondent's] allegations of such abuse." (Pet. App. 17a; citations omitted).

Obviously respondents do not take exception to this mandate. They do, however, bring to the Court's attention that the context in which it was made may later be construed too narrowly unless this court makes its determinations fully consistent with the Ninth Circuit's opinion. That statement by the court below was made in the context of its considerations on the "Propriety of Disclosure" under Subsection C saying that any grand jury abuse is relevant to any determinations to release materials under Rule 6(e)(3)(C)(i).[72] Respondents suggest that the issue of grand jury abuse is really a threshold question that should be resolved before any decision is made to disclose, or allow the use of, grand jury materials for civil purposes under any subsection of Rule 6(e).[73] For example, should this Court conclude, contrary to the Ninth Circuit decision, that the clause

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72 This was totally consistent with its decision, because the court had already held that the phrase "attorney for the government" was limited to an attorney enforcing criminal law and did not include a Civil Division attorney and that such attorney also had to proceed under Rule 6(e)(3)(C)(i).

73 The cases speak in terms of the threshold assumption of no improper use. *See, e.g., United States v. Proctor & Gamble, supra* note 36, at 683; *In The Matter of Grand Jury Proceedings (Miller Brewing Company), supra* note 36; at Point III, A thereof; *In re Grand Jury Subpoenas April 1978, at Baltimore, supra* note 47, at 1108; *In re April 1956 Term Grand Jury, supra* note 31, at 271-73. *See also* Senate Report, *supra* note 35, at 8, where it was stated that there was no intent in the Legislative history of Rule 6(e) to generally preclude the use of grand jury developed evidence for civil law enforcement purposes "assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation."

"attorneys for the government" in Rule 6(3)(3)(A)(i) includes Civil Division attorneys, then valid abuse issues should be preserved to be raised at any time grand jury materials were proposed to be used in civil proceedings by the agency or its surrogates, whether through a disclosure under Subsection C or otherwise.

Further, respondents urge that the issue of grand jury abuse properly raised is more than merely "relevant." It is truly a threshold question that requires as the first order of business express findings by the court, after an appropriate hearing that meets the standards of due process,[74] that no material abuse of the grand jury process has occurred. If the lower court finds that grand jury abuse has occurred, then no disclosure under Rule 6(e) should be permitted for civil use.[75]

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74 "The fundamental requisite of due process of law is the opportunity to be heard.... The hearing must be 'at a meaningful time and in a meaningful manner'." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1969).

75 *See* authorities note 73 *supra*. Respondents suggest that the *rationale* behind the exclusionary rule applied by the Court under the fourth amendment to unlawful search and seizure cases is appropriate to support a court refusal to release grand jury material under Rule 6(e) for use in civil proceedings because of a finding of misuse of the *ex parte* compulsory subpoena power of the grand jury. This Court stated the rationale for applying the exclusionary rule under the fourth amendment as follows:

> "[T]he rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures:
>
> > 'The rule is calculated to prevent, not to repair. *Its purpose is to deter--to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it.*' *Elkins v. United States*, 364 U.S. 206, 217 (1960)." *United States v. Calandra, supra* note 33, at 347 (emphasis added).

The case of *In re April 1956 Grand Jury, supra* note 31, at 273 stated that the improper use of the grand jury subpoena power to obtain materials for later use in civil proceedings abridges both fourth and fifth amendment constitutional rights. As Justice Holmes stated for the Court in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920):

> "[The] essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all." (emphasis added)

In *Cohen, supra*, where flagrant rule 6(e) violations existed with illegal disclosure by assisting IRS personnel of grand jury materials for civil use prior to obtaining a 6(e) order, the Tax Court actually applied the exclusionary rule and suppressed all of the grand jury materials stating at 323:

> "The conduct sought to be deterred in this case is the illegal use of grand jury material by Federal government employees in a civil investigation. As agency assistance to prosecutors before the grand jury becomes more prevalent, the temptation for the assisting personnel to utilize information presented to the grand jury in their own civil investigation will also increase, *unless the offending agency is denied the benefits of the illegality.*" (emphasis added)

Respondents realize that this is obviously not the forum to make specific findings on the abuse issue, and that is not what is sought here. Instead, they have brought to the Court's attention the record below in order: (1) To demonstrate to the Court that a strong *prima facie* case exists of grand jury abuse that should be heard; (2) To urge upon the Court that the issue of grand jury abuse should be treated as a threshold question requiring an appropriate hearing with proper findings before any disclosure is made under Rule 6(e); and (3) To demonstrate to the Court, along with *Hawthorne, Simplot, General Motors, Cohen* and other cases brought to the Court's attention, a benchmark of experience of the scope of the agency participation and involvement with the grand jury that easy access under Rule 6(e) promotes.

Respondents request, however, that the Court not let the Ninth Circuit remand on the abuse issues become lost in the process of this decision. Respondents further request that the Court provide some guidance to the lower courts as to the priority and importance of the abuse issues when properly raised. And, if the Court is so inclined, respondents request that the Court address the type of hearing due process requires and the scope of remedies the lower courts might provide in this much confused and uncertain area of the law.

II. THE ACCESS OF AN ATTORNEY FOR THE GOVERNMENT TO GRAND JURY MATERIALS UNDER 6(e)(3)(A)(i) IS LIMITED BY THE WORDS "IN THE PERFORMANCE OF SUCH ATTORNEY'S DUTY" TO CRIMINAL LAW ENFORCEMENT

In ARGUMENT I A, respondents reviewed the historical origins and purpose of the grand jury. It was only in its more recent evolution that the prosecutor was even allowed to participate directly in the proceedings. The sole rationale for the prosecutor becoming involved was to provide some direction, guidance and assistance to the grand jury in the performance of its *criminal investigation function* and to help the grand jury to frame proper indictments.[76] Thus, the traditional "duty" of the prosecutor dealt only with the criminal investigation function and his access to the grand jury materials was only to provide assistance in accordance with this criminal function.

In the adoption of Rule 6(e) in its original form in 1946, which permitted an attorney for the government access to grand jury materials without court order, respondents submit that the intent of Congress was to merely recognize the accepted function that "they may be present in the grand jury

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76 Pickholz, *supra* note 33, at 1031.

room during presentation of evidence" (1946 Rule 6(e) Advisory Com. Notes). Even the government acknowledges that an attorney for the government, performing in his *civil* capacity, cannot be present in the grand jury room during the proceedings (Gov't Br. 24 n. 19).

This Court has before it four *amicus curiae* briefs filed in support of respondents from the American Bar Association, American Civil Liberties Union, General Motors Corporation and the Miller Brewing Company, all of which thoroughly explore the legislative intent behind the 1977 amendment to Rule 6(e). Respondents will not belabor those well-reasoned arguments here. Respondents believe those briefs clearly establish that the intent of Congress in 1977 was only to expand the assistance made available to the grand jury to analyze copious technical evidentiary materials to make them more meaningful to the grand jury in discharging its constitutional mandate of criminal investigation. No charge was made in the 1946 Rule 6(e) wording carried into the revised format of Rule 6(e) either as to 6(e)(3)(A)(i) or as to 6(e)(3)(C)(i), and both the House and the Senate were content to allow the courts to deal with the proper interpretation of these two subsections.

The key definitional word is "duty", not definition of "attorney for the government" as the government emphasizes in its brief. The language "in the performance of such attorney's duty" is a *limitation on*, not an expansion of, attorney access to grand jury materials. The "duty" is criminal investigation not civil investigation (*U.S. v. Proctor & Gamble, supra*).

From a purely practical point of view, it must be recognized that attorneys performing civil enforcement duries are surrogates -- they advocate the position of the client they represent. They enforce specific civil claims on behalf of specific federal agencies or departments, and it is in the final analysis those agencies or departments they serve and must satisfy. As stated in *Capitol Indemnity Corp. v. First Minnesota Construction Co.*, 405 F.Supp. 929 (D. Mass. 1975) in ruling on an AUSA's right to grand jury materials while representing the Secretary of Housing and Urban Development (H.U.D.):

> "'Our problem emerges from our inquiry as to how far the "Attorney for the government" exception to the secrecy principle may extend *in view of the myriad situations in which the United States Attorney works with and through other government agencies* in developing factual material for civil and criminal actions. *In re Pflaumer & Sons, Inc.*, 53 F.R.D. 464, 468 (E.D. Pa. 1971). By permitting a 'civil' assistant U.S. Attorney carte blanche to share the fruits of his 'criminal' counterpart's grand jury inquiry, the twin dangers exist that the grand jury could be

used improperly as a vehicle for civil discovery and that the secrecy of the grand jury's deliberations could be compromised.'" (*Id.* at 932).

The fact than an AUSA may be representing an agency such as H.U.D. in a civil case as above, or that a Civil Division Attorney is used to collect money for the Department of the Navy as in this case, or that a Tax Division attorney is used to collect money on behalf of the IRS as in the companion case (Sells II), or the fact that an Environmental Protection Agency attorney may be specially appointed to conduct a grand jury investigation while at the same time proceeding to enforce civilly that agency's regulations[77] or that an IRS agency attorney can be specially appointed to assist in a grand jury investigation as in *General Motors* or that even a private attorney can be appointed for such purpose under 28 U.S.C. §§ 515, 543, all demonstrate that it is the *client, function, and duty* that must be considered, not the title given to the attorney. As held by the Ninth Circuit: except in the performancy of his criminal law enforcement duty, an attorney for the government should be required to seek a court order under 6(e)(3)(C)(i) for access to grand jury materials.

In ARGUMENT III, respondents include as one of the ten underlying policy considerations there enumerated the point that federal agency attorneys must proceed under 6(e)(3)(C)(i)--that there is no logical reason for giving any preference to Department of Justice attorneys representing agencies, departments or bureaus of the government in processing their civil claims (*see* discussion of Policy Consideration No. 9, *infra* ARGUMENT III).

III. THE APPROPRIATE SHOWING FOR DISCLOSURE OF GRAND JURY MATERIALS UNDER RULE 6(e)(3)(C)(i) IS A "COMPELLING AND PARTICULARIZED NEED" AND THE GOVERNMENT SHOULD BE HELD TO NO LESS A STANDARD

In all cases in which this Court has considered the matter it has held that disclosure of secret grand jury material under Rule 6(e) must be based upon a "particularized and compelling need."[78] The government now argues that this standard, while appropriate for private parties, is not applicable to disclosure to Civil Division attorneys and other government

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77 *United States v. Gold*, 470 F.Supp. 1336 (N.D. Ill. 1979); appeal dismissed, No. 79-1944 (7th Cir. 1979).

78 *See Douglas Oil v. Petrol Stops Northwest*, 441 U.S. 211; *United States v. Proctor & Gamble*, 356 U.S. 677; *Pittsburgh Plate Glass v. United States*, 360 U.S. 395 (1959).

personnel under 6(e)(3)(C)(i) for civil use, and urges that the easier "rationally related" test be applied. The courts below have differed on the application of the proper standard with the majority of the decisions applying the "particularized and compelling need" test.[79]

Because of the inconsistencies in the Courts below, respondents focus here on the underlying policy considerations which also impact on Respondents ARGUMENT II. Respondents have identified and set forth ten policy considerations that persuade against the government's arguments seeking easy access under Rule 6(e) for civil use:

1. The incentive for government to develop the adversary civil case on an *ex parte* basis would be increased.

2. The opportunity and incentive for parallel investigation would increase the risk of grand jury abuse.

3. The ability to detect or demonstrate grand jury abuse would be reduced or eliminated.

4. Breach of secrecy would inhibit disclosure to the grand jury and increase fear of reprisal.

5. The Civil Division (and other divisions) of the Department of Justice should not accede to investigative powers not granted by Congress.

6. Preferential treatment of Civil Division attorneys would provide a direct corridor for government agencies to grand jury materials.

7. The resulting imbalance and disparity in discovery powers would be a violation of due process.

8. Dilatory lawsuits, protracted proceedings, delayed filings and non-diligent discovery would be encouraged.

9. No logical reason exists to give Civil Division attorneys preference over federal agency attorneys to review secret grand jury materials.

10. The Civil Division is not foreclosed from access to grand jury materials.

Policy considerations 1, 2, 3, 4 and 5 are discussed by respondents as *amicus curiae* in their brief filed in *United States v. Baggot*, No. 81-1938 under the ARGUMENT II therein. That case, which also deals with the interpretation of Rule 6(e), has issues in common with this case to which those five policy considerations also apply. These five policy considerations are also embodied in ARGUMENT I. Policy consideration 6 is discussed by General Motors Corporation in its *amicus curiae* brief filed in

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79 *See* the eleven cases cited by General Motors Corporation in its brief *amicus curiae* in Argument II supporting the compelling and particularized need standard and compare with the two cases cited by the government in support of its rational relationship standard.

support of respondents in this case under its Argument I. Respondents will not duplicate again here those discussions made in the other briefs, and instead respectfully refer the Court to them. Respondents address here policy considerations 7, 8, 9 and 10 as follows:

POLICY CONSIDERATION NO. 7: The Resulting Imbalance And Disparity In Discovery Powers Would Be A Violation Of Due Process

Perhaps the reason which most strongly signals the unfairness and impropriety of the government's position is its claim that it has a right of access to grand jury materials on an *ex parte* basis without any showing whatsoever under 6(e)(3)(A)(i), or on a simple claim relationship showing under 6(e)(3)(C)(i), when a "private" litigant must go to a court and demonstrate a compelling and particularized need. The government argues that its function in redressing fraud is in the public interest whereas the respondents' interest seeking to maintain secrecy is merely parochial (Gov't Pet. at 20). Inherent in such an argument is a total rejection of the principle of due process which imputes liability only after a proper adversary proceeding, since due process is not served when one party to an adversary proceeding is given grossly superior discovery capabilities with which to prepare for trial.[80]

The benefit to society of discouraging misuse of the grand jury as well as in the unfairness of inequitable and imbalanced discovery powers outweigh the government's commendable mission of redressing its civil claims. If, however, such powers of civil investigation as an aid to prosecution are to be extended to the government, due process would require equal extension to the private litigant in aid of his defense. Otherwise, the private litigant may, for example: never become aware of exculpatory evidence presented to the grand jury; and, the private litigant may never be aware of inconsistent government testimony before the grand jury. The effect is that a private litigant is told to defend himself with one hand tied behind his back while the government, with its otherwise inordinate powers, now claims additional ones besides. This Roman game of Christians and lions is antagonistic to our adversarial system and concepts of due process. To permit grossly unequal discovery is contrary to this

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80 This is as applicable in civil law as it is in criminal law to which this Court has spoken as follows:

> "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations." *United States v. Dennis*, 384 U.S. 855, 873 (1966).

Court's mandate that "discovery . . . is not a one-way proposition."[81]

POLICY CONSIDERATION NO. 8: Dilatory Lawsuits, Protracted Proceedings, Delayed Filings And Non-Diligent Discovery Would Be Encouraged

Routine release of grand jury materials to the Civil Division will encourage undue delay of related civil suits. It will always encourage the commencement of civil actions against defendants following the criminal case rather than concurrent with the criminal case. In criminal cases involving violent crimes, convicted persons usually just go to jail. In criminal cases involving statutory economic crimes, convicted persons don't just go to jail; they spend years being additionally punished as defendants in government civil suits which are often overreaching in their demands.[82] The hope for what has been termed a "global settlement' – a settlement of both the criminal and the civil claims – is dashed since the civil claims simply are not processed because the Civil Division waits to be provided the *ex parte* developed evidence later under Rule 6(e).

The case at bar provides a good example of this propensity. While the Department of Justice had been aware of the matters involved in the case for several years through the existence of the criminal investigation, the Civil Division did nothing to civilly prosecute or even investigate. It waited until the approach of the statute of limitations and then raised the cry of a "compelling and particularized need" because of the possible expiration of the statute of limitations. Here the "need" resulted from the Civil Division's own dilatory procedures.

POLICY CONSIDERATION NO. 9: No Logical Reason Exists For Giving Civil Division Attorneys Preference Over Agency Attorneys To Review Secret Grand Jury Materials

No logical distinction exists for treating Civil Division attorneys more favorably than agency attorneys. Yet the case law is clear that disclosure to agency attorneys of grand jury materials must proceed under Rule 6(e)(3)(C)(i) under a showing of "compelling and particularized need."

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81 *Hickman v. Taylor*, 329 U.S. 495, 507 (1946); *see also Schlagenhauf v. Holder*, 379 U.S. 104, 113 (1964).

82 In the Navy claim brought by the Civil Division at least four of the named defendants in that action actually withdrew from the federal contracting activity long before the first claim was even filed on which the Civil Division based its false claims action. In an obvious attempt in that case to blaze new civil law the Civil Division has managed to hold all named defendants in the false claims action at great financial drain – three of them clear to this Court while the government seeks to also clarify the law as to Rule 6(e) for this and a myriad of other government cases. Respondents still face the government's goal of a trial on the merits and the likelihood of an appeal from there.

Attorneys for administrative agencies are not included in the definition "attorneys for the government" in Rule 6(e).[83] If the Civil Division has a duty of redressing civil wrongs against the Government, do agency attorneys not have the same duty?

While the SEC, IRS, FTC and numerous other agencies are given specific statutory authority to independently enforce their civil regulations, most executive agencies and departments are not, and they must proceed civilly through the Department of Justice. The rationale for giving certain agencies independent civil enforcement powers is because it is within the scope of their regulatory function, while it is more economically efficient to enforce other civil obligations through the Department of Justice. Functionally, the respective responsibilities of all government attorneys for civil law enforcement would seem of comparable importance and thus the Courts should look to the client, function and duty and not the title the attorney bears.

POLICY CONSIDERATION NO. 10: The Civil Division Is Not Foreclosed From Access To Grand Jury Materials

A decision of this Court affirming the Ninth Circuit decision will *not* preclude the Civil Division from obtaining grand jury materials as the Government contends. Rule 6(e)(3)(C)(i) which permits court-ordered disclosure in connection with a judicial proceeding is still available. It will be subject to court supervision and the government will have to demonstrate a compelling and particularized need. This is a balancing process left to the sound discretion of the trial judge. The government will have the opportunity of making an appropriate showing and the court can weigh the need for continued secrecy against the need for disclosure after an appropriate adversary hearing in which the interests of all affected parties may be heard.

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[83] *See United States v. General Electric Co.*, 209 F.Supp. 197 (E.D. Pa. 1962) (Tennessee Valley Authority Attorneys); *In re Grand Jury Proceedings*, 29 F.R.D. 151 (E.D. Pa. 1961) Aff'd. 309 F.2d 440 (3rd Cir. 1962) (Federal Trade Commission attorneys denied access).

The Court in *In Re Grand Jury Investigations*, 414 F.Supp. 74 (S.D. N.Y. 1976) anticipated the reasons why SEC attorneys must show a compelling and particularized need as follows:

> "[T]he grand jury is not an investigative tool at the disposal of the SEC or any other government agency, and the grand jury process may not be abused by allowing its work-product to be funneled to other government agencies which happen to have an interest in a subject which a grand jury has examined. Accordingly, Rule 6(e) empowers a judge to exercise his discretion in favor of disclosure only where the party seeking disclosure has shown that 'a particularized need' exists for the minutes which outweighs the policy of secrecy." (*Id.* at 76).

CONCLUSION

The independence and secrecy of the constitutional grand jury must be preserved. An institution conceived in the early common law and carried into our own Constitution should not be converted to uses not only never intended but destructive to the very spirit of the constitutional "shield" against arbitrary and oppressive governmental action it was intended to provide. Rule 6(e) should be interpreted accordingly and the decision of the Court of Appeals for the Ninth Circuit should be upheld.

November 12, 1982

Respectfully submitted,

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Petitioner's Reply Brief

Office-Supreme Court, U.S.
FILED
FEB 23 1983
ALEXANDER L. STEVAS,
CLERK

No. 81-1032

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

SELLS ENGINEERING, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The Court granted certiorari in this case to consider two important questions of statutory interpretation respecting Rule 6(e) of the Federal Rules of Criminal Procedure, which governs disclosure of grand jury materials. The government's opening brief argues initially that the plain language of Rule 6(e)(3)(A)(i), Fed. R. Crim. P., authorizes disclosure of grand jury materials to Civil Division attorneys engaged in preparation of a civil fraud action under the False Claims Act,[1] because such attorneys are "authorized assistant[s] of the Attorney General" (Fed. R. Crim. P. 54(c)) "perform[ing] such attorney[s'] duty" (Fed. R. Crim. P. 6(e)(3)(A)(i)). See 28 U.S.C. 518(b); 28 C.F.R. 0.45(d). We argue further that *United States* v. *Procter & Gamble Co.*,

[1] On September 13, 1982, Title 31 of the United States Code was enacted into positive law. Pub. L. No. 97-258, 96 Stat. 877 *et seq.* The False Claims Act now appears at 31 U.S.C. 3729-3731. See 96 Stat. 978-979. Compare Gov't Br. 37 n.35.

356 U.S. 677, 683-684 (1958), reflects approval of civil use of grand jury materials, as does the legislative and administrative history of Rule 6(e). Finally, we demonstrate that the decision of the court of appeals cannot be justified as a prophylactic measure designed to guard against the possibility of grand jury abuse, and that pertinent policy and practical considerations support a right of access for Civil Division attorneys.

Our second contention is that the restrictive standard announced in cases in which private parties have sought access to grand jury materials pursuant to Fed. R. Crim. P. 6(e)(3)(C)(i) does not govern such access by persons whose assistance is needed by Justice Department attorneys evaluating a False Claims Act claim (or access by those attorneys themselves, assuming that our primary contention is not accepted). We explain that the policy considerations dictating the strict rule respecting private access have little application to government attorneys and that the legislative intent reflected in the 1977 amendments to Rule 6(e) is that such disclosure should be deemed presumptively proper.

Running throughout our argument on both points is the teaching of *Procter & Gamble* that government use of grand jury materials for civil litigation is appropriate unless it is shown that the grand jury was "subverted"—*i.e.*, used solely for the purpose of developing evidence for civil litigation (356 U.S. at 683). Because *Procter & Gamble* establishes at a minimum that the evidence elicited by a grand jury may be employed by attorneys of the Department of Justice for civil litigation, the issue in this case is narrowed to the relatively technical one of the identity of the Justice Department attorneys who may make that use.

Indeed, this dispute arises only because the Attorney General has chosen to separate civil and criminal law enforcement responsibilities within the Justice Department, rather than to delegate all aspects of a case, both civil and criminal, to a single attorney or group of attorneys. See Gov't Br. 34-35. Thus, if our contentions are accepted, Justice Department attorneys with special expertise in civil false claims litigation will be able to review grand jury materials sent to them by their counterparts engaged in prosecutorial duties and by FBI agents assisting such prosecutors. On the other hand, if our contentions are rejected, civil use of grand jury materials will remain permissible, but access will be denied to Justice Department attorneys specializing in the relevant kinds of civil litigation absent a strong showing of need.

Remarkably, respondents and the amici curiae have not addressed the arguments we have made; instead, they seek to join issue on other matters far outside the scope of this case. This reply is necessary primarily to redirect attention to the issues on which the Court granted certiorari.

1. Respondents have unleashed a blunderbuss assault on contemporary grand jury practices, complaining, *inter alia*, of domination by government prosecutors (Br. 23-24) and the reliance on hearsay evidence to procure an indictment (Br. 9, 26). But this case affords no opportunity to consider the policy considerations mentioned by respondents, because the validity of their indictment is not open to question in this proceeding. Nor, contrary to respondents' intimation (Br. 21-23) and the suggestions of amicus curiae American Bar Association (Br. 6 n.6), is any constitutional question presented here. The Fifth Amendment provides that no person may be tried for a seri-

ous crime except upon indictment by a grand jury, but it does not supply any guidance respecting the use or disclosure of grand jury materials for purposes of civil litigation.

Respondents' assertion that considerations of due process are implicated in this case (Br. 46) is equally frivolous because no "liability" is to be "impute[d]" to any party on the basis of disclosed grand jury materials. Rather, those materials are to be used to assist the government in determining whether recourse to civil litigation is appropriate; if such litigation is commenced, the full panoply of due process rights would be available to a defendant. Moreover, the rule of equal access to grand jury materials proposed by respondents and the amici was rejected by the Court in *Procter & Gamble*, which held that only a demonstration that the grand jury was purposefully employed to gather evidence for civil litigation would warrant compensatory disclosure to private parties engaged in litigation against the government. 356 U.S. at 683-684; compare *id.* at 689-690 (Harlan, J., dissenting). Indeed, respondents' claim that due process is offended by unequal access to grand jury materials proves too much, because due process has never been thought to require that equal access to grand jury materials be afforded even to criminal defendants. Compare Fed. R. Crim. P. 6(e)(3)(A)(i) with Rule 6(e)(3)(C)(ii). See also *Dennis* v. *United States*, 384 U.S. 855, 868-875 (1966); Fed. R. Crim. P. 16(a)(1)(A) and (a)(3).

2. The overwhelming bulk of the argument marshalled by respondents (Br. 18-39), like much of the argument of the amici curiae (General Motors Br. 2-6, 15-17; Miller Brewing Br. 2-3, 19-20; ACLU Br. 37 & n.10), is directed to a question distinct from that

presented here: whether, and upon what terms, grand jury materials may be disclosed to the Internal Revenue Service for use in civil tax assessment proceedings after the conclusion of criminal proceedings, in circumstances where IRS personnel have assisted the prosecutor and grand jury and secured access to grand jury materials for that purpose pursuant to Rule 6(e)(3)(A)(ii).[2] It is the common contention of the respondents and amici that because Congress in 1977 facilitated the use of IRS personnel as agents of the grand jury by permitting disclosure of grand jury materials to such agents in order to assist prosecutors in enforcing the criminal law (see Fed. R. Crim. P. 6(e)(3)(A)(ii)), an irresistible temptation to misuse the grand jury has been created. Respondents and the amici unfold a scenario in which the IRS will abandon civil tax assessment procedures upon encountering the slightest obstacle to its information-gathering prerogatives, seize upon the slimmest basis for suspecting criminal wrongdoing, recommend institution of a grand jury investigation to the Department of Justice, assign its agents to assist and seize control of the grand jury, develop an evidentiary record designed to meet the needs of civil tax assessment rather than criminal investigation, and, upon the

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[2] Respondents and the two corporate amici are engaged in pending litigation with the United States respecting these issues. *Sells* v. *United States*, No. 80-5829 (9th Cir.) (*"Sells II"*) (withdrawn from submission after oral argument pending a decision in this case); *In re April 1977 Grand Jury Proceedings, United States* v. *General Motors Corp.*, No. 81-1182 (6th Cir.) (stayed pending *United States* v. *Baggot*, No. 81-1938); *In re Grand Jury Proceedings, Miller Brewing Co.*, Nos. 81-2077, 81-2115, 81-2407 (7th Cir.) (disposition of petitions for rehearing deferred pending a decision in this case).

completion of criminal proceedings, reap the benefits by securing disclosure of the materials involved under Rule 6(e)(3)(C)(i).

These serious (albeit wholly unfounded) allegations may have some bearing upon the issues in other cases, such as *Sells II* (pending in the Ninth Circuit) and the *General Motors* and *Miller Brewing* cases (pending respectively in the Sixth and Seventh Circuits; see page 5, note 2, *supra*), but they plainly have no bearing on the issues in this case. The question here is whether disclosure may be made to attorneys in the *Department of Justice*, who represent the United States. Thus, even if problems were thought to exist in parallel criminal and tax assessment proceedings, they have no relevance here.[3] Significantly, respondents do not allege that grand jury proceedings have ever been instituted for the purpose of adducing evidence for civil fraud litigation; all of their allegations pertain to the IRS. Nor is there any assertion that personnel employed by the Justice Department or by the Navy, the agency claimed to have been defrauded in this case, served as grand jury agents with the intention of developing a record for civil litigation. Accordingly, there is no reason to consider here the bald allegations made by respondents and the amici concerning the area of tax assessment.

Contrary to respondents' and amici's assumption, disclosure to Department of Justice attorneys is distinguishable in several important respects from dis-

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[3] We note, however, that respondents' reliance upon *In re J.R. Simplot Co.*, 77-1 U.S. Tax Cas. (CCH) ¶ 9146 (9th Cir. 1976), a case involving access to grand jury materials by IRS personnel, is misplaced. Not only was the cited opinion vacated as moot, it was expressly disapproved in the Senate report on the 1977 amendments to Rule 6(e). S. Rep. No. 95-354, 95th Cong., 1st Sess. 7 & nn.10 & 11 (1977).

closure to agency personnel. Perhaps most important, Justice Department attorneys alone are authorized to conduct grand jury proceedings and thus to acquire grand jury materials in that connection. Moreover, Congress has distinguished between Justice Department attorneys and agency counsel in Rule 6(e) itself. Only Justice Department attorneys fall within the scope of Rule 6(e)(3)(A)(i). Congress has limited disclosure under Rule 6(e)(3)(A)(ii) to agency support personnel whose assistance is required by a Justice Department attorney and has restricted the use that such personnel may make of the materials disclosed (Fed. R. Crim. P. 6(e)(3)(B)). Congress therefore has assured that agencies seeking to utilize grand jury materials for administrative proceedings or agency litigation must secure leave of court pursuant to Rule 6(e)(3)(C)(i). Hence, if, as respondents and amici claim, there is a heightened risk of misuse of the grand jury to serve the ends of the IRS, Congress has provided a mechanism to safeguard against that possibility. But Congress has not imposed any restriction comparable to Rule 6(e)(3)(B) upon civil use of grand jury materials by Justice Department attorneys.[4]

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[4] Amicus curiae ABA suggests (Br. 16-17) that the absence from Rule 6(e)(3)(A)(i) of language comparable to that found in Rule 6(e)(3)(A)(ii), limiting disclosure to Justice Department attorneys to use in criminal law enforcement, was an oversight, attributable to Congress' focus upon disclosure to nonattorney personnel at the time of the 1977 amendments. This explanation is belied, however, by the fact that Rule 6(e) was completely reorganized in 1977. The failure to alter the language that became Rule 6(e)(3)(A)(i) in 1977, while adding language parallel in form, but incorporating a significant additional restriction in Rule 6(e)(3)(A)(ii), is a telling indication that a distinction was in-

Respondents (Br. 44) and amicus General Motors (Br. 8-10) also raise concerns arising from the authority of the Attorney General to designate agency counsel as "special attorneys" pursuant to 28 U.S.C. 543 and to authorize such attorneys to conduct various kinds of proceedings, including grand jury proceedings, pursuant to 28 U.S.C. 515(a). Again, these concerns have no bearing on the questions presented. Whatever authority the Attorney General may bestow upon agency counsel, such counsel may not use grand jury materials for any purpose other than to fulfill their duties as special attorneys acting under the "specific[] direct[ion]" of the Attorney General (28 U.S.C. 515(a)). See, *e.g.*, *In re Perlin*, 589 F.2d 260, 264-268 (7th Cir. 1978). It is only in that temporary and limited capacity that a specially appointed attorney may be regarded as "an attorney for the government" who may receive disclosure of grand jury materials "for use in the performance of such attorney's duty" (Fed. R. Crim. P. 6(e)(3)(A)(i)).

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tended. The absence of any counterpart to Rule 6(e)(3)(B), which also was added to the Rule in 1977, is significant as well. Congress thus made clear that, consistent with *United States* v. *Procter & Gamble Co.*, *supra*, Justice Department attorneys privy to grand jury materials may use them for civil litigation without securing a court order. It is thus improbable indeed that Congress' failure to adjust Rule 6(e)(3)(A)(i) to impose an arbitrary distinction as to the identity of Justice Department attorneys able to employ grand jury materials in civil litigation was an oversight. We note in this regard that the ABA's suggestion that Congress expressed no view respecting civil use of grand jury materials by Justice Department attorneys in 1977 is inconsistent with the court of appeals' conclusion (Pet. App. 13a) that Congress indicated in 1977 that disclosure to such attorneys was to be made only by leave of court.

3. Contrary to respondents' submission (Br. 40-42), there is no need to address their claim of grand jury abuse before grand jury materials may be disclosed to Civil Division attorneys. None of the authorities cited by respondents suggests that such a determination of abuse must be made prior to disclosure pursuant to Rule 6(e)(3)(A)(i) to an attorney for the government. Rather, the cases and the legislative history of the 1977 amendments to Rule 6(e) demonstrate at most that abuse claims may be relevant at other junctures in litigation. *United States* v. *Procter & Gamble Co.*, *supra*, indicates that evidence of use of the grand jury for the purpose of developing evidence for civil litigation is relevant to an application for disclosure of grand jury materials to the defendant, once the government has commenced a civil suit employing the grand jury materials. *Procter & Gamble* does not hold either that the Antitrust Division attorneys in that case needed leave of the court supervising the grand jury to use grand jury materials in the civil case or that the abuse question should have been addressed prior to any disclosure to such attorneys.[5]

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[5] Other cases cited by respondents (Br. 40 n.73) pertain to disclosure of grand jury materials to the IRS. Moreover, *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956), cited by respondents, rests upon the view that civil use of grand jury materials is per se unlawful (*id.* at 271-273), a view rejected by this Court in *Procter & Gamble* and by Congress in 1977. See also 18 U.S.C. 3333(a).

Nor does the Senate Report on the 1977 amendments to Rule 6(e), S. Rep. No. 95-354, *supra*, indicate that a determination respecting abuse is necessary before disclosure can be made. The language cited by respondents (Br. 40 n.73) addresses only use of grand jury materials, not disclosure, and does not suggest an intention to upset the carefully

Respondents now suggest (Br. 37-38, 41 n.75) that a remedy modeled upon the Fourth Amendment exclusionary rule is appropriate here. But this suggestion runs counter to their argument presented heretofore that disclosure to government attorneys must await litigation of the abuse issue. We agree with respondents that an adequate remedy for demonstrated grand jury abuse is available when and if an effort is made to introduce grand jury materials into evidence. We do not concede, however, that the appropriate remedy is necessarily suppression; the only pertinent decision of this Court, *United States* v. *Procter & Gamble Co.*, *supra*, suggests that compensating disclosure might be appropriate. 356 U.S. at 684. See Gov't Br. 35 n.32. In any event, on no theory could the exclusionary rule analogy require denial of disclosure (or even a threshold determination whether abuse occurred) in this setting, because here the claimed abuse entails only the alleged use of the grand jury to develop evidence for civil tax assessment—not for the purposes of this False Claims Act action. Thus, the deterrence rationale of the exclusionary rule is simply inapplicable. See *United States* v. *Janis*, 428 U.S. 433, 454 (1976).[8]

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crafted distinction between disclosure as of right under Rule 6(e)(3)(A) and disclosure by leave of court under Rule 6(e)(3)(C). Moreover, additional language in the Senate Report (at 8 n.12) suggests that it is a sufficient safeguard that "[c]ivil misuse can be raised in subsequent civil proceedings."

[8] The allegation of abuse is in any event insubstantial, as explained in our opening brief (at 35 n.31). We note, as well, that a primary focus of respondents' "abuse" claim has

The issue respondents would have this Court address is squarely presented to the Ninth Circuit in the pending *Sells II* litigation, where the district court considered and rejected respondents' claim of abuse. Respondents are not entitled to litigate that issue before this Court in the present context.[7]

4. Respondents' arguments (Br. 42-48) in opposition to our contentions are variations upon the claim that application of any rule other than that governing private litigants seeking disclosure of grand jury materials will create an unacceptable opportunity and incentive for misuse of the grand jury. As we have previously noted, this claim is based almost entirely upon a factual scenario pertaining to the IRS that is not relevant here and that is governed by a different statutory framework. We have also explained, in

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been, and continues to be (Br. 9, 26), the prosecutor's alleged reliance upon hearsay evidence in securing an indictment. But see *Costello* v. *United States*, 350 U.S. 359 (1956). Plainly that allegation has no bearing on the disclosure in issue.

[7] The Ninth Circuit has elected to defer decision in *Sells II* pending this Court's decision in the present case. But the common issue between the cases is the standard for disclosure under Rule 6(e)(3)(C)(i)—the second question presented by our petition—not whether the grand jury that indicted respondents was abused. Moreover, while many of the arguments made by the government in *Sells II* are similar to those we make on the second issue in this case, the standard determined to be applicable to Department of Justice attorneys engaged in False Claims Act litigation under Rule 6(e)(3)(C)(i) (if Rule 6(e)(3)(A)(i) is held inapplicable to Civil Division attorneys), and to personnel whose expert assistance they need, would not necessarily be controlling upon an application for disclosure by the IRS. The special practical and policy considerations applicable to each situation must be separately considered.

our opening brief (at 35 & n.2) and above, that the possibility of abuse does not logically support the decision of the court of appeals. If disclosure is made as of right under Rule 6(e)(3)(A)(i), an appropriate remedy for demonstrated abuse remains available if and when the government seeks to use the grand jury materials in a civil action. And to the extent disclosure is subject to Rule 6(e)(3)(C)(i), the district court supervising the grand jury is empowered to determine whether there is any substance to the charge of abuse. There is no need to accomplish this result indirectly by raising obstacles to disclosure under Rule 6(e). Such a rule would inevitably lead to denial of disclosure in instances where abuse is not present; it simply does not respond selectively to the problem claimed to exist.

Moreover, the argument of respondents and the amici is misdirected, because they assume that the issue is whether civil use of grand jury materials is permitted. As we have explained, *United States* v. *Procter & Gamble Co.*, *supra*, answers that question in the affirmative. Respondents and the amici do not address the question that is actually presented: whether Rule 6(e) should be interpreted to impose arbitrary impediments to efficient use of Department of Justice attorneys acting within their areas of expertise, pursuant to the plenary authority of the Attorney General to assign responsibility for matters entrusted to his charge among his assistants. The single exception is amicus curiae ACLU, which appears to recognize the significance of our statement of the issue presented, but which confines itself to questioning our reading of *Procter & Gamble* (ACLU Br. 47-51 & n.13). The ACLU argues that *Procter & Gamble* does not address the standard for disclosure to Department of Justice attorneys or indicate that such disclosure

may be carried out without a court order. The reasons for our contrary reading of *Procter & Gamble* are fully set out in our opening brief (at 16-21). But even if, contrary to our submission, *Procter & Gamble* reflects no view respecting the terms of disclosure to individual government attorneys, contrary to the ACLU's further argument (Br. 50 n.13) the Court there plainly approved retention of grand jury materials for use in civil litigation. See 356 U.S. at 678, 683-684. Thus, neither respondents nor any of the amici provide any explanation why Rule 6(e) should be interpreted in a manner that restricts the Attorney General's discretion in managing the division of work among his assistants without advancing any relevant public policy.

5. A few remaining points warrant attention.

a. Amicus ACLU argues (Br. 9-12) that Fed. R. Crim. P. 6(e) does not control the disclosure of grand jury materials for use in civil litigation and that the Federal Rules of Civil Procedure are the exclusive authority governing discovery in that context. The short answer is that this contention is refuted by *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979). There, the Court unanimously concluded that the propriety of disclosure of grand jury materials to a private litigant in a civil action turned upon application of Rule 6(e)(3)(C)(i). 441 U.S. at 220; *id.* at 232 (Rehnquist, J., concurring); *id.* at 234-235 n.3 (Stevens, J., dissenting).

Nor is the ACLU's contention that the Federal Rules of Civil Procedure should alone govern disclosure of grand jury materials persuasive in the setting of this case. The civil discovery rules generally govern production of documents among parties to civil litigation. But here attorneys for the United States

already have access to the grand jury materials. What is sought is disclosure to additional individuals within the government, a subject that is regulated not by the civil discovery rules but by Fed. R. Crim. P. 6(e). By contrast, the policies of the civil discovery rules are relevant when disclosure of grand jury materials is sought by a private party under Rule 6(e)(3)(C)(i). Thus, the relatively strict standard governing such disclosure under Rule 6(e)(3)(C)(i) was adopted in part from practices in civil discovery. Compare *Douglas Oil Co.* v. *Petrol Stops Northwest*, *supra*, 441 U.S. at 217-223 (applying Rule 6(e)(3)(C)(i)), with *United States* v. *Procter & Gamble Co.*, *supra*, 356 U.S. at 681, 684 (applying civil discovery rules).[8] The ACLU would ignore the single most salient factor that sets disclosure to Civil Division attorneys apart from disclosure to private parties. In any event, the ACLU's argument based on civil discovery rules fails to take account of a principal purpose for which Civil Division attorneys seek disclosure of grand jury materials: to make possible intelligent screening of potential civil fraud cases *prior to* the filing of a complaint.

b. In our opening brief (at 32-33), we explained that the considerations supporting grand jury secrecy, enumerated by this Court in *United States* v. *Procter & Gamble, Co.*, *supra*, 356 U.S. at 681-682 n.6, quoting *United States* v. *Rose*, 215 F.2d 617, 628-629 (3d Cir. 1954), are inapplicable here. Amicus ACLU insists (Br. 45), however, that potential wit-

[8] Significantly, the procedure fashioned in *Douglas Oil* to implement the standard announced in that case takes advantage both of the special expertise of the district court supervising the grand jury (the Rule 6(e) court) and the knowledge of the district court entertaining any pending civil action, which would have jurisdiction of a civil discovery motion. 441 U.S. at 224-231.

nesses might be reluctant to testify before a grand jury if their testimony may be made public. But disclosure to Justice Department attorneys does not raise this concern, because such attorneys would use the grand jury materials only for the internal purposes of assessing whether a civil action should be instituted and, if necessary, preparing the civil case. Civil Division attorneys may not make further disclosures except as authorized by Rule 6(e). At every juncture, the contempt sanction operates to safeguard against unauthorized disclosure.

c. Respondents seek (Br. 47) to attribute some sinister significance to the fact that the Civil Division generally awaits the completion of grand jury proceedings before initiating civil litigation that is based in part upon grand jury materials. Rather than betokening some policy of delay designed to place defendants at a disadvantage, this practice merely reflects the fact that prosecutorial entities generally defer disclosure of grand jury materials until the criminal investigation and any prosecution is complete. This practice is a substantial safeguard against any temptation to employ the grand jury to elicit evidence for civil litigation and serves the salutary purpose of preventing unwitting interference with an ongoing prosecution. It also enables the Civil Division to make maximum use of evidence that has become part of the public record of any criminal trial, thereby minimizing the need for access to grand jury materials.

d. Amicus ABA claims (Br. 13-17) that the legislative history of the 1977 amendments to Rule 6(e) reveals that a court order is required for all civil use of grand jury materials. For the reasons stated in

our opening brief (at 25-32), that conclusion is erroneous. See also page 7, note 4, *supra*. One statement contained in the ABA's brief, however, requires an additional response. In support of its contention, the ABA quotes (Br. 14) the following language (S. Rep. No. 95-354, 95th Cong., 1st Sess. 8 (1977)):

> "[T]he Rule seeks to allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws by (1) providing a clear prohibition, subject to the penalty of contempt and (2) requiring that a court order under paragraph (c) be obtained to authorize such disclosure."

The ABA has misinterpreted the significance of this statement. Read in context, the Senate Committee's comment plainly was directed at persons other than Justice Department attorneys—*i.e.*, those who have received disclosure of grand jury materials under Rule 6(e)(3)(A)(ii). The Committee's reference to "such prosecutorial power," denotes the power, granted to the prosecutor by Rule 6(e)(3)(A)(ii), to enlist the assistance of technical experts without a court order. The Senate Committee's reference to grand jury misuse also was based upon the prospect of disclosure to agency personnel who have interests unrelated to Justice Department litigation. See S. Rep. No. 95-354, *supra*, at 6. And the "clear prohibition" mentioned is Rule 6(e)(3)(B), which limits the use of grand jury materials to purposes in furtherance of criminal prosecution, but which again has no application to Justice Department attorneys. Thus, the requirement mentioned by the Senate Committee that a court order be obtained under Rule 6(e)(3)(C)(i) if

civil use is to be made of grand jury materials was directed only at persons other than "attorneys for the government." Read in the fashion suggested by the ABA, the Committee's comment would have to be understood as an attempt to overrule *United States* v. *Procter & Gamble Co.*, *supra*. But the Committee clearly had no such intent. See S. Rep. No. 95-354, *supra*, at 8 & n.13. And if Congress had desired to change settled law so drastically, it undoubtedly would have said so. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 285 n.13 (1974).

For the foregoing reasons and the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 399253 1200

Amicus Brief

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Supreme Court, U.S.
FILED
NOV 5 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1032

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
Petitioner

v.

SELLS ENGINEERING, INC., *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The American Bar Association (hereinafter A.B.A.) is a voluntary, national membership organization of the legal profession. Its more than 280,000 members come from every state, territory, and the District of Columbia. Its constituency includes prosecutors; public defenders; private lawyers; trial and appellate judges at the state and federal levels; legislators; law professors; law enforcement and corrections personnel; law students; and a number of nonlawyer "associates" in allied fields. Since its inception over 100 years ago, the Association has taken an active interest in the improvement of the administration of justice.

As part of that effort, the A.B.A. has been concerned with the role of the Grand Jury as indicated by the adop-

tion by the A.B.A. House of Delegates of 30 A.B.A. Grand Jury Principles and an A.B.A. Model Grand Jury Act. *See A.B.A. Grand Jury Policy and Model Act (1977-1982)*[1] (1982). The Association's concern in adopting these policies was twofold: to preserve the grand jury's important function in investigating possible criminal activity and, at the same time, to guarantee procedural fairness. The premise underlying the Association's recommendations was a belief that these objectives could be best accomplished by maintaining the historic secrecy of the grand jury and by limiting access to grand jury materials, absent a court order, to those who appear before the grand jury as part of their duty to enforce federal criminal law. The concern for potential abuse was not diminished by recognition of the fact that most prosecutors exercise their powers in a responsible fashion. Rather, the need for procedural guarantees was felt warranted because the "growing number" of alleged cases of grand jury abuse suggested "that judicial attempt[s] to monitor the prosecutor's conduct on a case-by-case basis cannot remedy the institutional defects which permit the abuses to occur . . ." *Grand Jury Policy and Model Act* at 20.

The Association's interest, however, goes beyond a general concern for grand jury procedures and specifically focuses upon the interpretation of Federal Rule of Criminal Procedure 6(e) which is the subject of the litigation in the case at bar. The Association supported the 1977 amendment to Rule 6(e) which facilitated the use of technical assistance for government lawyers in grand jury investigations. At the same time, the Association's spokesman made it clear that the dissemination of grand jury information to government personnel must not be

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[1] This document was published by the Criminal Justice Section of the American Bar Association in June of 1982. In subsequent references it will be referred to as *"Grand Jury Policy and Model Act."*

"used in violation of any constitutional rights, in unrelated criminal cases, or in any civil proceedings." *Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 95th Cong., 1st Sess. 111 (1977).[2] Furthermore, the Association urged Congress to adopt an explicit legislative statement to guard against misinterpretation of the rule which could lead to misuse of grand jury materials for civil purposes. *Id.* Subsequently the Association proposed an amendment to present Rule 6(e)(3)(A)(i) which would make its understanding of that rule explicit by limiting disclosure without a court order to a government attorney "for use in the performance of such attorney's duty *to enforce federal criminal law*" (addition underlined). *Grand Jury Policy and Model Act* at 5.[3]

Since membership of the A.B.A. includes prosecutors, defense attorneys, and judges who must act within the guidelines of any ruling by this Court as to the proper interpretation of that criminal rule, the A.B.A.'s interest is significant. The Association, in recognition of the importance of the traditional secrecy of the Grand Jury and of the intent of the limited scope of the 1977 amendment to Criminal Rule 6(e), participates as Amicus Curiae[4] to urge this Court to affirm the decision of the United States Court of Appeals for the Ninth Circuit requiring judicial authorization before grand jury materials may be disclosed to government attorneys for civil purposes.

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[2] In subsequent references this publication will be identified as "Hearings."

[3] The Association's proposed amendment to Rule 6(e)(3)(A)(i) has been submitted to the Judicial Conference's Advisory Committee on Criminal Rules. The Committee has tabled consideration of the proposal pending the Court's decision in the present case.

[4] Copies of letters indicating the parties' consent to the Association's participation have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The American Bar Association appears as Amicus Curiae to address the question of whether Federal Rule of Criminal Procedure 6(e) authorizes an "attorney for the government" who has purely civil responsibilities to use grand jury material without court approval.[5] The Association believes that Criminal Rule 6(e) does not authorize such disclosure and urges this holding of the Ninth Circuit below be affirmed upon two separate grounds.

First, the Association would emphasize that the grand jury and the concomitant secrecy of its proceedings are older than the nation itself. Given the historic, constitutional, and policy grounds supporting the maintenance of confidentiality in such proceedings, any authorization for additional disclosure of grand jury information must be accompanied by an expression of intent in the clearest and most unequivocal form. Since there was no such expression of intent with respect to government attorneys with purely civil duties, the criminal rule cannot be properly interpreted to authorize such disclosure.

Second, an examination of the legislative history of the 1977 amendment to Criminal Rule 6(e) and the harm it was designed to overcome will demonstrate that its objective was limited to providing technical assistance to government attorneys who had responsibility for representing the government in proceedings before federal grand juries. This interpretation of Rule 6(e) does not mean that grand jury materials cannot be disclosed to

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[5] This issue is presented by the United States' First Question for Review: "Whether an attorney serving in the Civil Division of the United States Department of Justice engaged in preparing a civil fraud action under the False Claims Act is 'an attorney for the government * * * performing such attorney's duty' within the meaning of Federal Rule of Criminal Procedure 6(e)(3)(A)(i), and accordingly is entitled to examine relevant grand jury materials without judicial authorization." Brief for the United States at (I).

government attorneys for civil law purposes. It only contemplates the continuation of the common law policy under which judicial authorization is required before such disclosure can be made.

Whether the individual seeking disclosure of grand jury materials represents a private litigant or is a government attorney with civil enforcement responsibilities, the standard which should guide the court should protect the policy interests underlying the secrecy of the grand jury and continue the common law practice of meaningful judicial supervision of disclosure in order to prevent the potential of grand jury abuse. Because the determination of whether such a standard was met here turns upon the particular facts of the case, this issue can be most effectively discussed by the parties and will not be addressed by the Association.

ARGUMENT

I. THE INTENT TO CREATE AN EXCEPTION TO GRAND JURY SECRECY MUST BE EXPRESSED IN CLEAR AND UNEQUIVOCAL TERMS

The grand jury is an institution whose roots extend into English common law. It was highly valued by the founders of this country and given constitutional stature by the ratification of the Fifth Amendment in 1791. One of the distinguishing characteristics of the grand jury is that, at least since the 1600s, its proceedings have been closed to the public and kept confidential. Calkins, "Grand Jury Secrecy," 63 Michigan L. Rev. 455, 457 (1965).

The idea of grand jury secrecy was "imported into our federal common law and is an integral part of our criminal justice system." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218, n. 9 (1979) (citations omitted). This principle has been consistently reaffirmed by this Court. E.g., *Douglas Oil Co. v. Petrol Stops Northwest, supra* at 218; *Dennis v. United States*, 384

U.S. 855, 869 (1966); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958). *See also Smith v. United States*, 423 U.S. 1303, 1304 (1975) (Douglas, Circuit Justice). Criminal Rule 6(e), which sets forth a general rule of grand jury secrecy, is declaratory of these principles, *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 398 (1959), and of a policy that is "older than our Nation itself." *Id.* at 399. Except as specifically authorized, the rule prohibits disclosure of "matters occurring before a grand jury" by anyone, other than a witness, who has the right to be present in a grand jury proceeding. Fed. R. Crim. P. 6(e)(2). A knowing violation of this rule is punishable as a contempt of court.

In addition to the claims of history and the Constitution,[6] there are substantial policy reasons supporting protection for the confidentiality of grand jury proceedings. *See United States v. Rose*, 215 F. 2d 617, 628-29 (3d Cir. 1954), *quoted with approval* in *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219, n. 10 (1979), and *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-682, n. 6 (1958). The Seventh Circuit in *In re State of Illinois Petition to Inspect and Copy Grand Jury Materials*, 659 F. 2d 800, 803, n. 7 (7th Cir. 1981) (pending on certiorari *sub nom. Illinois v. Abbott & Associates*,

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[6] It is worthy of note that the concept of grand jury secrecy may also have a constitutional dimension. The Fifth Amendment requires the federal government to use the grand jury to initiate the prosecution of felonies. This Court has indicated that secrecy is an "indispensable" aspect of the grand jury, *United States v. Johnson*, 319 U.S. 503, 513 (1943), and that its "proper functioning" "depends" upon the secrecy of the proceedings. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979). An abrogation of grand jury secrecy that would alter its fundamental nature as defined at the time of the ratification of the Fifth Amendment or which would impair that institution to the extent that it could no longer function could constitute an abridgement of the Fifth Amendment itself.

No. 81-1114) identified reasons supporting grand jury secrecy even after the criminal proceedings have terminated to include:

> "'. . . to encourage free and untrammeled disclosure by persons who have information with respect to the commission of crimes; [and] to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.' *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 n. 10, 99 S.Ct. 1667, 1673 n. 10, 60 L.Ed.2d 156 (1979) (citation omitted). Moreover, 'the grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow.' *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682, 78 S.Ct. 983, 986, 2 L.Ed.2d 1077 (1958)."

Given the importance of the long-established rule of grand jury confidentiality, exceptions to grand jury secrecy should be attributed to the Criminal Rules only where there has been a clear and unequivocal expression of intent to abrogate such secrecy. This approach invokes a traditional principle of construction that actions in derogation of the common law must be strictly construed.

For example, judicial immunity, like grand jury secrecy, pre-dated the Constitution. When Congress enacted what is now codified as 42 U.S.C. § 1983, it provided for liability for "[e]very person" who acted under the color of state law to deprive another of his/her federal rights, privileges or immunities. Looking to the "face" of the statute, or applying a "plain meaning" rule, one might conclude that the "every person" language of § 1983 encompassed judges and that consequently they would be amenable to suit under that statute. Indeed, there was respectable authority for exactly that proposition. *Picking v. Pennsylvania R. Co.*, 151 F.2d 240, 250-

251 (3rd Cir. 1945). Nevertheless, this Court held that the doctrine of judicial immunity was so well established that unless Congress "specifically" provided for its abolition, such immunity was not deemed to have been affected by the "every person" language of the statute. *Pierson v. Ray*, 386 U.S. 547, 554 (1967).[7]

In the case at bar, the principle of grand jury secrecy is as firmly established and deeply rooted in history and law as official immunity. The interpretation which the United States seeks to place upon Criminal Rule 6(e) would result in an abrogation of a portion of that traditionally protected confidentiality.[8] Yet the relevant portion of the current rule provides no clear statement of an intention to further curtail grand jury secrecy. Rather, "the restrictions as presently enacted . . . leave *unresolved* the question of whether an 'attorney for the government' who has purely civil responsibilities may use grand jury material without court approval." *Grand Jury Policy and Model Act* at 15, Commentary to Proposed Amendment to Rule 6(e) F.R.Cr.P. (Emphasis added) Indeed, the fact that the lower federal courts are divided upon the extent to which Criminal Rule 6(e)

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[7] This same reasoning had previously been utilized in *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) where the Court held that the "general language" of § 1983 was not sufficient to overcome the well-established principle of legislative immunity.

[8] The concern for the confidentiality of grand jury materials reaches beyond disclosure to government attorneys with civil enforcement responsibilities and extends to the use of grand jury materials in civil litigation. If such information were to be kept confidential and shielded from discovery, then the government would enjoy an unfair advantage over an opposing party in civil litigation. On the other hand, disclosure of grand jury materials to an opposing civil litigant would further erode grand jury secrecy. Utilization of the court-ordered disclosure provisions of Criminal Rule 6(e)(3)(C) avoids this dilemma by allowing the court to weigh the need for disclosure against the requirements of secrecy in grand jury proceedings.

authorizes disclosure, *compare, e.g., In re Grand Jury Investigation No. 78-184 (Sells v. United States)*, 642 F.2d 1184 (9th Cir. 1981) *with In re Grand Jury (LTV)*, 583 F.2d 128 (5th Cir. 1978), is itself an indication that there was no unequivocal expression of an intent to curtail grand jury confidentiality. This being the case, it must be presumed that the traditional secrecy of the grand jury continues.

II. RULE 6(e) REQUIRES JUDICIAL AUTHORIZATION BEFORE GRAND JURY MATERIALS MAY BE DISCLOSED TO JUSTICE DEPARTMENT CIVIL DIVISION ATTORNEYS FOR USE IN CIVIL LITIGATION

Rule 6(e) of the Federal Rules of Criminal Procedure recognizes two types of exceptions to the general rule of secrecy: court-ordered disclosure, Fed. R. Crim. P. 6(e)(3)(C), and automatic disclosure without the need for judicial authorization, Fed. R. Crim. P. 6(e)(3)(A). The automatic disclosure provisions of Rule 6(e) are limited to attorneys for the government for use in the performance of their duties, Fed. R. Crim. P. 6(e)(3)(A)(i), and to government personnel to assist an attorney for the government in the performance of his/her duties to enforce federal criminal law. Fed. R. Crim. P. 6(e)(3)(A)(ii). Except for these two limited situations allowing free access to grand jury materials, Rule 6(e) requires application to a court for lawful disclosure of such material.

The only cases in which this Court has examined disclosure of materials covered by grand jury secrecy have concerned court-ordered disclosure. *See, e.g., Douglas Oil Co., v. Petrol Stops Northwest*, 441 U.S. 211 (1979); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959); *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958). In these cases, this Court has repeatedly expressed its desire to safeguard the secrecy of grand

jury proceedings and imposed exacting standards for any disclosure.

United States v. Procter & Gamble Co., 356 U.S. 677 (1958) is this Court's only case where the facts included the government's use, without a court order, of grand jury materials for civil purposes. The issue, however, concerned the standards for court-ordered release of grand jury materials to the private party. The propriety of governmental access to grand jury materials for civil purposes without a Rule 6(e) order was never discussed in the majority opinion. It cannot be assumed that the silence of the Court meant approval of this practice. Indeed, in his concurring opinion, Justice Whittaker felt compelled to express, in strong language, that the secrecy afforded the grand jury by law must not be breached either by government or defense counsel, absent court order. *Id.* at 685. The majority opinion, had it intended approval of governmental access to grand jury matters as of right for civil purposes, could have stated its position by addressing Justice Whittaker's opinion. Rather, it chose to remain silent on this issue. It is difficult, if not impossible, to draw from the majority's silence any inference of approval of automatic government access to grand jury materials for civil use.

The few lower federal court opinions to face the issue of disclosure of grand jury materials to civil government attorneys as a matter of right are split in their decisions. Besides the Ninth Circuit, those rejecting such disclosure as a matter of right include *In Re Grand Jury*, 82 F.R.D. 70 (N.D. W.Va. 1979) and *Capitol Indemnity Corp. v. First Minnesota Construction Co.*, 405 F. Supp. 929 (D. Mass. 1975). Those sanctioning civil government access without court order include *In Re Grand Jury (LTV)*, 583 F.2d 128 (5th Cir. 1978) (per curiam); and *United States v. General Electric Co.*, 209 F. Supp. 197 (E.D. Pa. 1962).

For disclosure as a matter of right under Rule 6(e), two conditions must be met. First, the disclosure must be made to an attorney for the government or assisting government personnel. Fed. R. Crim. P. 6(e)(3)(A)(i) and (ii). Attorney for the government is defined as "The Attorney General, an authorized assistant of the Attorney General, a United States Attorney, or an authorized assistant of a United States Attorney . . . ." Fed. R. Crim. P. 54(c). Second, the disclosure must be made for use in the performance of such attorney's duty.

The only duty of the government attorney specifically mentioned in Rule 6(e) is the duty to enforce federal criminal law. Fed. R. Crim. P. 6(e)(3)(A)(ii). To be sure, the first part of the automatic disclosure exception to grand jury secrecy does not explicitly define the duty of the attorney for the government. Fed. R. Crim. P. 6(e)(3)(A)(i). The meaning of such duty, however, is made clear from the history of Rule 6(e).

The original Rule 6(e), which became effective in 1946, entitled attorneys for the government access to grand jury materials without a court order. The Advisory Committee on Criminal Rules that drafted the original Rule 6(e) explained that the provision for disclosure to attorneys for the government was included because "they may be present in the grand jury room during presentation of evidence." Advisory Committee Notes on Fed. R. Crim. P. 6(e) (1946), 18 U.S.C. App. at 1411. Because a grand jury can only legitimately be used for criminal investigations, *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), an attorney for the government who could properly be present in the grand jury room would be acting in performance of his duty to enforce federal criminal law. On the other hand, an attorney for the government with no criminal law enforcement responsibility may not be present in the grand jury room. Fed. R. Crim. P. 6(d). The Brief for the

Government concedes as much (Brief for the United States, 24 at n.19).

Accordingly, it is the criminal law enforcement duty of a government attorney that authorizes presence in the grand jury room and it is the same duty that permits automatic access to grand jury materials. There is no indication in the Advisory Committee Notes to the original Rule 6(e) that the disclosure of right provision for government attorneys was intended to include disclosure for civil as well as criminal duties. The clear intent of the drafters of the original Rule 6(e) was to authorize automatic disclosure only to government attorneys whose criminal duties required use of grand jury materials.

Furthermore, the wide range of duties that may be assigned to an attorney for the government as defined in Rule 54(c) means that "attorney for the government" cannot be the only test for automatic disclosure under Rule 6(e). For example, in *Capitol Indemnity Corp. v. First Minnesota Construction Co.*, 405 F. Supp. 929 (D. Mass. 1975), an Assistant United States Attorney was assigned to represent an administrative agency, the Department of Housing and Urban Development (HUD). In the course of performing his duties, the Assistant United States Attorney sought grand jury materials to assist him in his capacity as counsel for HUD in a civil action. The federal district court denied release of the grand jury materials to the Assistant United States Attorney, stating:

> By permitting a "civil" assistant U.S. Attorney carte blanche to share the fruits of his "criminal" counterpart's grand jury inquiry, the twin dangers exist that the grand jury could be used improperly as a vehicle for civil discovery and that the secrecy of the grand jury's deliberations could be compromised. *Id.* at 932.

It is clear that the application of Rule 6(e) disclosure to attorneys for the government turns on the scope of the government attorney's professional responsibilities rather than merely upon his status as a Rule 54(c) attorney. It is unlikely that the drafters of Rule 6(e) intended a blanket disclosure of grand jury materials for any and all purposes simply by reference to the definition of attorney for the government contained in Rule 54(c). It is more likely and far more consistent with the policy of grand jury secrecy, that Rule 6(e) confines automatic access only to those whose duties as attorneys for the government are directly related to the function of grand jury investigations—the enforcement of federal criminal law.

The subsequent amendment of Rule 6(e) in 1977 confirms this interpretation of "duty" in Rule 6(e). This Court proposed an amendment that provided for automatic disclosure of grand jury materials to government personnel by adding the following language: "For purposes of this subdivision, 'attorneys for the government' includes those enumerated in Rule 54(c); it also includes such other personnel as are necessary to assist the attorneys for the government in the performance of their duties." 425 U.S. 1157, 1161 (1976).

The proposed amendment, like the original Rule 6(e), used the word, "duties," without defining what duties were intended. The Advisory Committee on Criminal Rules that drafted the proposed amendment indicated quite clearly though that the "duties" referred to in the proposed amendment were criminal law enforcement duties. The Advisory Committee stated that the "proposed amendment reflects the fact that there is often government personnel assisting the Justice Department in grand jury proceedings." Advisory Committee Notes on Proposed Amendment to Fed. Crim. R. 6(e) (1976), 18 U.S.C. App. (Supp. IV) at 611. The Advisory Com-

mittee added that the amendment would be "subject to the qualification that the matters disclosed be used only for purposes of the grand jury investigation." *Id.* Because the Advisory Committee must have been aware of the fact that grand jury proceedings are proper only for criminal investigations, it appears clear that it intended to continue to limit the automatic disclosure exception to grand jury secrecy to government attorneys and personnel who were assisting the grand jury in its criminal investigations.

Before the proposed amendment could take effect, Congress acted to postpone its effective date and then revised Rule 6(e). The present version of Rule 6(e) reflects that Congressional modification. The legislative history in both the House and the Senate indicates that Rule 6(e) was intended to authorize disclosure of grand jury proceedings to government attorneys without a court order only for criminal law enforcement.

The Senate Committee was explicit in stating that civil use of grand jury materials requires a court order. In answering concerns about revealing grand jury materials to government personnel who may be more interested in civil law enforcement, the Report of the Senate Committee states:

> [T]he Rule seeks to allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws by (1) providing a clear prohibition, subject to the penalty of contempt and (2) requiring that a court order under paragraph (c) is obtained to authorize such a disclosure.

S. Rep. No. 95-354, 95th Cong., 1st Sess. 8 (1977).

The Senate Committee recognized that civil use of grand jury proceedings can be legitimate, but the Committee suggests that Rule 6(e), as amended, would require a court order when disclosure for civil litigation

purposes was intended. The Committee Report states: "Accordingly, the Committee believes and intends that the basis for a court's refusal to issue an order under paragraph (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be no more restrictive than is the case under prevailing court decisions." *Id.* at 8. Although this statement concerns the standard for the court to apply in ordering disclosure under Rule 6(e)(3)(C), it assumes that a court decision is required prior to disclosure for non-criminal purposes. Furthermore, nothing in the Senate Report suggests that attorneys for the government are entitled to use grand jury materials in civil cases without judicial authorization.

The hearings before the Subcommittee on Criminal Justice of the House Committee on the Judiciary also indicate that Congress intended judicial oversight in civil use of grand jury materials. The Subcommittee was led by key witnesses to believe that grand jury materials would not be used for civil purposes unless approved by court order. For example, Mr. Richard L. Thornburgh, the Acting Deputy Attorney General in charge of the Criminal Division, presented the Justice Department's view of the proposed Rule 6(e). Mr. Thornburgh stated:

> Now, when you begin to move beyond the parameters of that particular investigation, we get to the point that you and I both have some trouble with. The cleanest example I can think of where a 6(e) order is clearly required is where a criminal fraud investigation before a grand jury fails to produce enough legally admissible evidence to prove beyond a reasonable doubt that criminal fraud ensued.
>
> It would be the practice of the Department at that time to seek a 6(e) order from the court in order that that evidence could be made available for whatever civil consequences might ensue.

> If there were fraud against the Government: for example, there would be a civil right of the Government to recover penalties with respect to the fraud that took place. *Hearings* at 67.

Similarly, Professor Wayne LaFave, Reporter of the Advisory Committee on Criminal Rules that drafted the proposed amendment for the Supreme Court, stated that "to the extent that administrative agencies and the U.S. attorneys may have somewhat overlapping responsibilities, I don't think it follows that the U.S. attorney can make disclosure to other people." *Hearings* at 93.

In reliance upon such assurances, the House Subcommittee on Criminal Justice approved the modification of Rule 6(e) believing that the rule, as amended, would not change what they were led to believe was the practice with respect to automatic disclosure. Remarks of Representative Mann, Chairman of the House Subcommittee on Criminal Justice (123 Cong. Rec. 25194). Based on assurances of witnesses such as Professor LaFave and Mr. Thornburgh, the Subcommittee understood that the prevailing practice of disclosing grand jury material for non-criminal purposes only with prior judicial authorization would be continued under the amendment.

There is nothing in the legislative history to suggest that Rule 6(e) disclosure to attorneys for the government was intended to authorize release of grand jury materials for non-criminal purposes. Nor is there any indication in the legislative history that the "duty" of the government attorney in Rule 6(e)(3)(A)(i) was intended to be different or broader than the "duty to enforce federal criminal law" in Rule 6(e)(3)(A)(ii). Rather than suggesting substantive differences in the duties referred to in each subsection, the different language reflects the legislative process by which Rule 6(e) was amended. *See* 425 U.S. 1157, 1161. It was Congress that added "duty to enforce Federal criminal law"

to the present version of Rule 6(e). The failure to define duty the same way in both subsections is explained by the fact that Congress was concerned with the proposed amendment's extension of disclosure to nonattorney government personnel and not with the disclosure to attorneys for the government exception. *See* S. Rep. No. 95-354, 95th Cong., 1st Sess. 6-7 (1977). That Congress defined "duty" only in the subsection that deals with government personnel and not in the subsection that concerns attorneys for the government is therefore understandable.

In light of the Congressional concern for grand jury secrecy and the potential "misuse of the grand jury to enforce non-criminal Federal laws," S. Rep. No. 95-354, 95th Cong., 1st Sess. 8 (1977), Rule 6(e) should be construed to restrict automatic access to grand jury materials by attorneys for the government to criminal law enforcement. In civil litigation, government counsel should be required, like lawyers for private parties, to apply for a court order under Rule 6(e)(3)(C)(i) to obtain the release of otherwise secret grand jury materials. This approach not only recognizes the importance of grand jury secrecy, but also implements the concept of checks and balances between the judicial and executive branches of government in a manner which is particularly appropriate given the unique role of the grand jury. Such an interpretation of Rule 6(e) will not preclude government attorneys charged with duties to enforce civil law from obtaining grand jury information when legitimate reasons exist. What it will do is preserve the traditional, common law role of the judiciary in supervising the disclosure of otherwise confidential grand jury information.[9]

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[9] Indeed, where Congress has seen a need to allow government investigation for the enforcement of civil statutes, it has enacted legislation authorizing the same. *See* The Antitrust Civil Process Act, 15 U.S.C.A. § 1310, *et seq.* Its failure to legislate more gen-

Whether the individual seeking disclosure of grand jury materials represents a private litigant or is a government attorney with civil enforcement responsibilities, the standard which should guide the court should protect the policy interests underlying the secrecy of the grand jury and continue the common law practice of meaningful judicial supervision of disclosure in order to prevent the potential of grand jury abuse. Because the determination of whether such a standard was met here turns upon the particular facts of the case, this issue can be most effectively discussed by the parties and will not be addressed by the Association.

CONCLUSION

This Court should construe Rule 6(e) to require a court order as a means by which attorneys for the government may obtain grand jury materials for use in non-criminal litigation. Such a construction is compatible with the intent of the framers of the rule and the policy of grand jury secrecy. This interpretation will not prevent the Government from obtaining such materials when a legitimate reason for their use in civil law enforcement activities exists. Rather, it will merely provide for continuation of the policy of judicial approval and

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erally suggests all the more that free access to grand jury materials was never the intent of Congress.

Requiring a Court order for the disclosure of grand jury information is especially important in areas where both criminal and civil remedies are available. In those instances the Government may have alternative investigative powers whose use depends upon the sanction sought. The existence of civil and criminal remedies supports the need for court supervision of the disclosure of grand jury materials because of the potential for misuse of the grand jury as a means of collecting evidence for the purpose of pursuing civil remedies. Court-ordered disclosure of grand jury materials keeps clear the distinction between civil and criminal procedures; protects against grand jury abuse; and insures that the requirements of grand jury secrecy will be given full consideration before any disclosure is made.

supervision in instances where grand jury secrecy is to be abrogated for use in non-criminal proceedings. For these reasons the Amicus Curiae, American Bar Association, submits that the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
NOV 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1032

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

UNITED STATES OF AMERICA,

Petitioner,

vs.

SELLS ENGINEERING, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE ACLU FOUNDATION OF SOUTHERN CALIFORNIA, FILED IN SUPPORT OF SELLS ENGINEERING, INC., et al.

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QUESTION PRESENTED

Whether Rule 6(e)(3)(A)(i) of the Federal Rules of Criminal Procedure grants the United States, as a civil party, the ex parte right to inspect grand jury materials without demonstrating a particularized need to do so, in the absence of any provision in the Federal Rules of Civil Procedure granting such a right?

STATEMENT OF INTEREST OF AMICI CURIAE

The American Civil Liberties Union Foundation is a nationwide non-partisan organization with a membership of greater than two hundred fifty thousand, dedicated to protecting and defending fundamental rights of the people of the United States. The ACLU Foundation of Southern California is an affiliate of the American Civil Liberties Union, operating in Southern California. This case involves the scope of the secrecy protections historically granted persons who appear before a grand jury. The American Civil Liberties Union Foundation and the ACLU Foundation of

Southern California hereby submit this brief as amici curiae in support of respondents Sells Engineering, Inc., et al./1/

1/ All parties to this proceeding have consented to the filing of this brief. The letters of consent required by Supreme Court Rule 36.2 are already on file with the Court.

SUMMARY OF ARGUMENT

1. This Court has long held that the preeminent rule governing proper statutory construction is that the context in which a statute occurs is the most accurate guide to its intended meaning, Securities and Exchange Commission v. Joiner Leasing Corp., 320 U.S. 344, 350-51 (1943). Here, the fact that Rule 6(e)(3)(A)(i) is found in the Federal Rules of Criminal Procedure makes highly suspect the Government's contention that the Rule was intended to regulate a civil Governmental litigant's right of access to relevant and probative grand jury materials. Further, the legislative history surrounding the adoption of Rule 6(e)(3) demonstrates that Congress intended that the Government must seek leave of court before acquiring access to grand jury

materials for purposes of prosecuting civil actions.

2. The only effect of the decision below is to require that when the Government seeks to obtain grand jury materials for use in civil actions, it must abide by the same civil discovery rules controlling the discovery practices of all other civil litigants in the federal courts. There is no provision in the Federal Rules of Civil Procedure which grants the Government a right to conduct ex parte civil discovery of criminal grand jury materials. Nor can one fairly be implied since when Congress has chosen to grant to the Government special privileges under the Federal Rules of Civil Procedure, it has specifically done so. Further, because a private civil litigant must demonstrate a particularized need before gaining access

to grand jury materials, Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979), granting civil attorneys for the Government access to those same documents as a matter of right would create an overwhelming and inequitable disparity in knowledge between the Government and a private defendant, a situation long held to be repugnant to our system of civil discovery. Moreover, the Government would not be substantively prejudiced if it were denied carte blanche access to grand jury materials since it need only make the showing required of any other litigant.

3. In United States v. Proctor & Gamble, Co., 356 U.S. 677, 683 (1958), this Court announced that "it would be flouting the policy of the law" for the Government to impanel a grand

jury to elicit information about a civil case. Because a grand jury's investigatory powers are so extensive, it would be extremely tempting for any Civil Division or agency attorney to seek impanelment of a grand jury (thereby gaining access to sworn testimony and pertinent documents) when his or her own independent investigations become frustrated. Hence, if Civil Division attorneys were granted an absolute right of access to grand jury materials in every case without having to make any showing of specialized need, the grand jury could inexorably become reduced to a mere tool in the Government's civil discovery process. Moreover, because the true reasons behind convening a grand jury are solely in the mind of the individual seeking impanelment, judicial review of any potential abuse would be

severely limited upon adoption of the Government's position in this action.

4. The paramount need for keeping the proceedings of a grand jury secret has long been recognized by this Court. While there are instances in which the "veil of secrecy" surrounding the grand jury's operations must be lifted, such disclosures must be done "discretely and limitedly." United States v. Proctor & Gamble, Co., 356 U.S. 677, 683 (1958). The Government here does not seek "discrete and limited" access to grand jury documents. Rather, it proclaims an absolute right to review all such materials in every case, without making any showing of its need to inspect such materials vis-a-vis the continuing need to keep such proceedings secret. Such wholesale inspection of the fruits of the grand jury's investigations

would severely endanger the secrecy necessary for a grand jury's optimal effectiveness and render impotent this Court's many decisions protecting such secrecy.

I

THE LEGISLATIVE HISTORY OF RULE 6(e)(3)(A)(i) DEMONSTRATES THAT CONGRESS INTENDED THAT A DEPARTMENT OF JUSTICE CIVIL DIVISION ATTORNEY SHOULD BE GRANTED ACCESS TO GRAND JURY MATERIALS ONLY AFTER SECURING LEAVE OF COURT TO DO SO

The overriding issue presented by this proceeding is the determination of Federal Rule of Criminal Procedure 6(e)(3)(A)(i)'s proper scope. The Government contends that Rule 6(e) is intended to regulate not only federal criminal proceedings, but is also intended to intrude into the regulation

of civil Governmental litigation as well. Indeed, the Government's position is that Criminal Procedure Rule 6(e) grants Department of Justice Civil Division attorneys the absolute right to inspect grand jury documents in every civil case brought by the Government, irrespective of whether those materials are available to the Government through other readily accessible means. Such an interpretation is forcefully rebutted by the existing case law, the policies behind Rule 6(e)'s adoption, and by the clear legislative intent expressed by Congress coincident with the passage of Rule 6(e) in its present version.

In Securities and Exchange Commission v. Joiner Leasing Corp., 320 U.S. 344, 350-51 (1943) this Court firmly established the fundamental and overriding principle governing statutory

construction that the context in which a statute is placed is the most important guide to its meaning:

> Some rules of statutory construction come down to us from sources that were hostile toward the legislative process itself and thought it generally wise to restrict the operation of an act to its narrowest permissible compass. However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine the courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and/or interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy (footnotes omitted.)

Here, Rule 6(e)(3)(A)(i) is included within the context of the

Federal Rules of Criminal procedure. On its own such evidence mandates rejection of the Government's contention that Rule 6(e)(3)(A) takes precedence over the discovery provisions of the Federal Rules of Civil Procedure. However, the obvious internal structuring of Rule 6(e)(3) itself is also indicative of Congress' intention that grand jury materials be made available to all civil litigants in the federal courts, including the Government, only after successfully obtaining leave of court authorizing such access.

Rule 6(e)(3) is divided into three subparagraphs. Subparagraphs (A) and (B) govern those situations where access to grand jury materials is granted as a matter of right, while Subparagraph (C) controls those cases in which leave of court must be obtained

before inspection of such documents is permitted. Specifically, Subparagraph(A) provides that grand jury materials may be disclosed to "an attorney for the government for use in the performance of such attorney's duty" (Subsection (A)(i)), and that those materials may also be disclosed to "such government personnel as are deemed necessary by an attorney for the government to assist an attorney . . . in the performance of such attorney's duty to enforce the criminal law" (Subsection (A)(ii)). Subparagraph (B) regulates the permissible activities of those individuals to whom disclosure of grand jury documents was made under Subsection (A)(ii), and provides that such individuals may use any information gained about the grand jury only when assisting the Government attorney "in the

performance of such attorney's duty to enforce the criminal law."

Subparagraph (C), on the other hand, states that upon leave of court, disclosure of grand jury materials may be made to anyone "when so directed by a court preliminarily to or in connection with a judicial proceeding" (Subsection (C)(i)) or to a criminal defendant "upon a showing that grounds exist for a motion to dismiss the indictment." (Subsection (C)(ii)).

The applicability of Subsections (A)(ii) and (B) are each limited by their own terms to only those situations involving an "attorney's duty to enforce federal criminal law." While that precise phrase is missing from Subsection (A)(i), its context within Rule 6(e)(3) makes clear that such a limitation is a part of the statute,

since its appearance in subsection (A)(ii) and not (A)(i) is inexplicable on policy grounds. Indeed, it is evident that Congress intended to provide that anyone associated with the enforcement of federal criminal law be granted access to grand jury materials as a matter of right under Subsections (A) and (B), while requiring that everyone involved in non-criminal proceedings be entitled to inspect such materials only after securing such leave of court to do so under Subsection (C). Moreover, the requirement that Civil Division attorneys are obligated to seek leave of court to secure access to grand jury materials is also confirmed in the Senate Report of the bill which included the current version of Rule 6(e):

> On the other hand, the Rule [Rule 6(e)] seeks to allay the concerns of

those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws by (1) providing a clear prohibition, subject to the penalty of contempt and (2) requiring that a court order under paragraph (C) be obtained to authorize such a disclosure. There is, however, no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes. On the contrary, there is no reason why such use is improper, assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation. Accordingly, the Committee believes and intends that the basis for a court's refusal to issue an order under paragraph (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be no more restrictive

> than is the case today under prevailing court decisions. It is contemplated that the judicial hearing in connection with an application for a court order by the government under subparagraph (3)(C)(i) should be ex parte so as to preserve, to the maximum extent possible, grand jury secrecy.

S. Rep. No. 95-354, 95th Cong. 1st Sess., 8 (1977) (emphasis supplied; footnotes omitted.) Clearly, the intent was that any Government attorney involved in a non-criminal proceeding must seek a court order for disclosure under Subparagraph (C), and not that a Civil Division attorney have access to such documents as a matter of right under Subparagraph (A)(i).[2]

2/ In its discussion of this passage from the Senate Report, the Government misses completely the report's central point. The Government contends that:

(footnote continued on next page)

This implication is also manifested by the comments of Representative Mann, upon his explanation of the Senate's version of the bill to the House:/3/

> Recent cases have indicated that an attorney for the Government may utilize

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(footnote continued from previous page)

> [T]he court of appeals' inference that the Senate Report disapproves of disclosure of grand jury materials to Department of Justice attorneys responsible for relevant civil litigation is entirely unfounded.

Brief for the United States, p.31, n.28. The court of appeals did not rule that disclosure of such materials was disapproved of by the Senate Report. Rather, it properly held that the Senate Report reflects Congress' intent that such disclosure was to be accomplished only upon successfully securing leave of court to inspect such materials.

3/ The House adopted the Senate version, 1977 U.S. Code Cong. & Ad. News, 91 Stat. 322.

> the assistance of other Government personnel and provide them with access to grand jury material in connection with the investigation of that grand jury -- but may not allow such material in connection with solely civil investigations or in connection with criminal investigations unrelated to that grand jury's inquiry.

123 Cong. Rec. 25,194 (1977) (emphasis supplied).

Hence, it is manifest that Congress did not intend for the attorneys in the Department of Justice's Civil Division to have access to grand jury materials as a matter of right. Rather, the intent of Congress was that a court should decide when the transcripts and documents resulting from a grand jury's investigations should be disseminated to

the Civil Division's attorneys pursuant to Rule 6(e)(3)(C).[4]

4/ The Government attempts to sweep aside the clear Congressional mandate requiring that leave of court be obtained before grand jury materials be disseminated to anyone involved in the civil litigation process by stating that the 1977 amendments to Rule 6(e) were intended to apply only to those individuals assisting the Government's attorneys, and not to the Civil Division's lawyers themselves (Brief for the United States, pp. 30-31). However, there is nothing in those portions of the Congressional Record and the Senate Report quoted above which in any way suggest that Congress intended the application of its expressed policies to be so restricted. Indeed, the language used in those reports is phrased in the broadest possible terms, and demonstrates that no Congress intended that no disclosure of grand jury documents be made to anyone outside the criminal process without first securing court approval.

II

WHEN THE GOVERNMENT PURSUES A CIVIL ACTION, THERE IS NO REASON TO TREAT IT DIFFERENTLY FROM ANY OTHER CIVIL LITIGANT RESPECTING ITS DESIRE FOR WHOLESALE ACCESS TO GRAND JURY MATERIALS

Another way to view the central question to be decided in this proceeding is whether the United States, when it brings a civil action, is entitled to civil discovery rights far surpassing those of any other civil litigant in the federal courts, in the absence of any specific provision in the Federal Rules of Civil Procedure granting it those rights. Stripped of its gloss, the Government's position is that Rule 6(e) of the Federal Rules of Criminal Procedure simultaneously mandates that:

(1) when the United States initiates a civil suit, it has an absolute ex parte right of access to inspect the transcripts and documents resulting from any federal grand jury's investigations; and (2) that the private party defendant in that very same civil proceeding is entitled to inspect such materials only after demonstrating to a court a particularized need to do so. Such a patently unfair interpretation of Rule 6(e) carries with it neither logical nor equitable support, and it is respectfully submitted that it should not be adopted by this Court.

In Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979), this Court held that before private civil parties could obtain access to grand jury materials, they had to demonstrate that their "need for

disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed." The holding of the court of appeals herein is simply to require that when the Government brings a civil action, it also must abide by the Douglas Oil standard. The Government completely ignores this issue in its brief, and instead implicitly contends that Federal Rule of Criminal Procedure 6(e)(3)(A)(i) rides roughshod over the discovery provisions of the Federal Rules of Civil Procedure, and grants the United States an absolute right to use the fruits of the grand jury's investigations as part of its civil discovery on an ex parte basis, without the necessity of making any demonstration of its need for such materials. That the Government fails to cite a single

decision, article, statute, or any other authority supporting such a fundamentally suspect contention is hardly surprising, for none exists.

It is axiomatic that the United States as a civil litigant is "bound by the discovery provisions of the Federal Rules of Civil Procedure in the same respects as any ordinary litigant." Sperandeo v. Milk Drivers & Dairy Employees, Local Union No. 537, 334 F.2d 381, 384 (10th Cir. 1964). See also United States v. Proctor & Gamble, Co., 356 U.S. 677, 681 (1958); United States v. Carter Products, Inc., 27 F.R.D. 243, 245 (S.D.N.Y. 1961). There is no provision within the Federal Rules of Civil Procedure which provides that the Government has any right to examine grand jury transcripts or to inspect any documents subpoenaed by

the grand jury on any basis not available to other civil parties. Nor can it be convincingly maintained that such a right can be implied, for when Congress has chosen to imbue the Government with special privileges as a civil litigant, it has specifically done so./5/ Thus,

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5/ For example, the United States has sixty days to answer any civil complaint filed against it, whereas private defendants have but twenty days (Fed. R. Civ. P. 12(a)); the District Court presiding over a case in which the constitutionality of a statute affecting the public interest is questioned must notify the Attorney General if the United States is not a party to that litigation (Fed. R. Civ. P. 24(c)); the United States is not liable for any expenses, fees, or discovery sanctions except to the extent expressly permitted by statute (Fed. R. Civ. P. 37(f)); severe limitations exist on the types and amounts of costs which can be assessed against the United States upon the entry of an adverse judgment (Fed. R. Civ. P. 54(d)); special evidence must be established before a default judgment can be entered against the United States (Fed. R. Civ. P. 55(e)); and the United States cannot be required to post any bond, obligation or other security upon the entry of a stay pending appeal (Fed. R. Civ. P. 62(e)).

the absence of any specific entitlement for the Government to engage in ex parte civil discovery within the Federal Rules of Civil Procedure is significant, and compels the conclusion that no such right was either intended by Congress, or now exists.

If the Government's contentions in this action are adopted, the result will be an enormous and unacceptable disparity of knowledge and resources in many, if not most, civil actions brought by the Government. Under the Government's view, prior to the initiation of civil Governmental litigation, Civil Division attorneys are entitled to read all pertinent documents and to review sworn testimony from all percipient witnesses appearing before a grand jury. Indeed, the Government's discovery could well be complete even

before its complaint is filed. The United States, like any other potential plaintiff, is of course entitled to undertake whatever factual investigation it desires prior to filing a civil action. However, no warrant exists for granting the Government, as plaintiff, free access to documents and testimony produced pursuant to the subpoena and contempt powers of the grand jury when no such right is accorded the private civil litigant.

In Dennis v. United States, 384 U.S. 855, 873 (1966), this Court declared that the existence of such a disparity in the ability to obtain necessary information between the Government and a criminal defendant was impermissible, since "it is rarely justifiable for the prosecution to have exclusive access to a storehouse of

relevant fact." Such inequity is equally repugnant to the fundamental policies respecting equal access to information, which constitute the foundation of our civil discovery system:

> The basic philosophy of the present Federal procedure [respecting discovery] is that prior to trial every party in a civil action is entitled to the disclosure of all relevant information.

In re Master Key, 53 F.R.D. 87, 90 (D.Conn. 1971), n.3, quoting from 8 C. Wright & A. Miller, Federal Practice and Procedure (§ 2001, Purposes of Discovery) p. 15 (1970). See also, Hickman v. Taylor, 329 U.S. 495, 501 (1947) ("Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the

fullest possible knowledge of the issues and facts before trial."). Simply put, our system of civil justice requires that the race down the litigation road should not begin with the plaintiff having obtained a judicially sanctioned fifty yard head start./6/

6/ The manifest injustice involved in allowing the Government free rein to inspect all grand jury materials, while severely restricting a civil defendant's right of inspection under Douglas Oil, supra, coupled with our civil discovery system's commitment to requiring equal access to relevant facts, provides a complete answer to the Government's conclusion that "there is no warrant" for this Court to require that the United States undertake separate criminal and civil investigations when it proceeds both criminally and civilly against the same defendant (Brief for the United States, p. 39). Moreover, even if the requirement that the Civil Division separately conduct its own civil discovery would result in the Government's being forced to bear some additional financial costs, such an argument is of little moment. This Court has long recognized that the Government is often required to bear some increased

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Furthermore, requiring the United States to litigate under the same discovery rules as all other civil parties would not prejudice in the slightest the Government's ability to secure any civil remedy to which it may be entitled. So long as documents produced in response to a grand jury's subpoena are relevant and not privileged, the Government in a civil action is entitled to request their production pursuant to Rules 30(b) or 34 of the Federal Rules of Civil Procedure. Similarly, under Fed. R. Civ. P. 30, the Government is also entitled to depose any witness who may possess relevant

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burdens in order both to secure fundamental constitutional values and to protect significant rights of persons within the federal court system. See e.g. Miranda v. Arizona, 384 U.S. 436, 482-491 (1966).

information and elicit exactly the same type of sworn testimony as would be available in the transcripts of the grand jury hearings. In fact, the only changes between requiring the Government to pursue its civil discovery in accordance with the Federal Rules of Civil Procedure versus permitting it to engage in ex parte civil discovery pursuant to Criminal Procedure Rule 6(e), would have salutory effects, i.e., the civil defendant's attorney would have a right to be present during all discovery in order to interpose relevancy and materiality objections when appropriate; to caution his or her client when a privilege was being waived; to cross-examine any deposed witness; and generally to protect his or her client's rights.

In the absence of specific enabling legislation under the discovery rules, there is no reason to believe that the Government is entitled to extraordinary civil discovery rights. If the information contained in grand jury materials is otherwise available, the Government must attempt to secure it through depositions, document production requests, interrogatories, or the like. If such information is not otherwise available, the Government should be directed, like any other civil party, to petition the court and demonstrate that its need for access to such materials outweighs the need for continued secrecy of those documents. Approval of the Government's theory that it is entitled to grand jury transcripts and documents as a matter of right in <u>every</u> case without making such a showing would make

empty the important fairness and equality of access premises on which the civil discovery rules are grounded, and should not be permitted./7/

7/ In Section II of its brief, the Government contends that if Civil Division attorneys (and those who assist them) do not have the absolute right to examine grand jury materials, this Court should hold that access should be permitted upon a showing that the materials have a "rational relation" to the performance of their civil law obligations. This theory is unavailing for the same reasons given above. Any greater leeway given the Government in the standards respecting the right to inspect grand jury materials in a civil action would result in an impermissible disparity in civil discovery opportunities between the Government and a private party, and should not be authorized by this Court.

III

PERMITTING A CIVIL DIVISION ATTORNEY ACCESS TO GRAND JURY DOCUMENTS AS A MATTER OF ABSOLUTE RIGHT COULD EASILY, AND IMPERMISSIBLY, RESULT IN THE GRAND JURY BEING USED AS A TOOL OF CIVIL DISCOVERY

In United States v. Proctor & Gamble, Co., 356 U.S. 677, 683 (1958), this Court set forth the absolute rule that a criminal grand jury may not be convened for purposes of conducting civil discovery:

> It [the trial court] undoubtedly was influenced by the fact that the prosecution was using criminal procedures to elicit evidence in a civil case. If the prosecution were using that device, it would be flouting the policy of the law.

Granting a Civil Division attorney the absolute right to inspect

all grand jury materials would result in a severe danger that such "flouting the policy of the law" would become commonplace, and that the grand jury would often be used as just another weapon in the Government's civil discovery arsenal. The investigative powers of a grand jury are far in excess of those granted any federal agency/8/, and even extend beyond those granted a civil litigant under the Federal Rules of Civil Procedure./9/ Indeed, the grand jury has been aptly characterized as:

8/ See, Hassett, J. M., "Ex Parte Pre-Trial Discovery: The Real Vice of Parallel Investigations," 36 Washington and Lee L. Rev. 1049, 1051 (1979).

9/ For example, a witness has no right to have his or her counsel present when testifying before a grand jury, In re Groban, 352 U.S. 330, 333 (1956); no materiality or relevance objections may be interposed to any questions asked a

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> [A] grand inquest, a body with powers of investigation and injunction, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular

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grand jury witness, Blair v. United States, 250 U.S. 273, 282 (1919); a subject under grand jury investigation has no right to cross-examine anyone who may give testimony adverse to his or her position, Hannah v. Larche, 363 U.S. 420, 448-49, reh. denied 364 U.S. 855 (1960); there is no constitutional requirement that a witness be told that he or she is the subject of a grand jury's investigation, United States v. Washington, 431 U.S. 181, 186-89 (1977); a witness has no general right of appeal from the denial of a motion to quash a grand jury subpoena without risking a contempt citation, Cobbledick v. United States, 309 U.S. 323, 327-28 (1940); and while a witness is theoretically entitled to assert a privilege in response to an improper question, In Re Grand Jury Investigation (Hipes), 603 F.2d 786, 787 (9th Cir. 1979), the efficacy of such an entitlement must be questioned in light of the complexity of the privilege doctrine and the absence of the witness' counsel in the grand jury room.

> individual will be found properly the subject to an accusation of crime.

Blair v. United States, 250 U.S. 273, 282 (1919).

Consequently, there can be little doubt that if, for example, an Internal Revenue Service investigation of possible taxpayer improprieties became thwarted before its completion, the temptation for an agency attorney to seek impanelment of a grand jury to continue the investigation would be overpowering./10/ Similarly, if a

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10/ The strong likelihood that just such an improper use of the grand jury's function was made in the present action quite obviously influenced the court of appeals below, "In fact, frustration over limitations on civil discovery may have prompted the government to convene the grand jury here." (Appendix A, p. 12a of the Government's Petition for Writ of Certiorai.) Such concern was entirely well founded. Here, the grand jury was

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Civil Division attorney was unsuccessful in gathering sufficient information about a potential civil defendant prior to filing a complaint, the adversarial urge to inspect sworn testimony and subpoenaed documents before filing a potentially unsuccessful suit could understandably color a Government attorney's decision to convene a grand jury. Further, since the rationale for convening a grand jury is purely in the mind of the individual

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convened only after the I.R.S. experienced delay in the enforcement of its summonses, and once impanaled, the grand jury asked "for many of the materials previously sought by [the I.R.S.'] administrative summonses." (Appendix A, p. 2a, of the Governments Petition for Writ of Certiorai). Similar concerns are also raised in the "sister case" currently pending before the Court of Appeals for the Ninth Circuit involving the eventual disclosure of the same grand jury materials at issue in this proceeding to I.R.S. investigators (Respondent's Brief in Response to Petition for Writ of Certiorai, pp. 3-6).

seeking impanelment, there can perforce be little meaningful judicial review of that decision to insure that the grand jury was convened to elicit evidence of criminal and not civil infractions. The only way to protect the grand jury's historic functions from becoming "flouted" on a regular basis is thus to prohibit Government attorneys from obtaining wholesale access to grand jury materials, and require that they seek leave of court and demonstrate a particularized need for those documents before being granted the opportunity to inspect them. Indeed, it was with the idea of prohibiting exactly this type of activity that led the court of appeals to conclude:

> To grant the government an absolute right of access to grand jury materials for civil use might irresistibly

> encourage use of the grand jury as a tool of civil discovery. It would also severely limit court review of any such abuse.

Appendix A, p. 12a of the United States' Petition for Writ of Certiorai; original emphasis. See also Capitol Indemnity Corp. v. First Minnesota Construction Co., 405 F. Supp. 929, 932 (D. Mass. 1975) ("By permitting a 'civil' Assistant U.S. Attorney carte blanche to share the fruits of his 'criminal' counterpart's grand jury inquiry, the dangers exist that the grand jury could be used improperly as a vehicle for civil discovery. . . .") Therefore, due to the high likelihood that the grand jury would become merely a civil discovery tool upon granting the Civil Division an absolute right of access to grand jury documents, the decision of the court below should be affirmed.

IV

GRANTING A CIVIL DIVISION ATTORNEY WHOLESALE DISCOVERY OF THE FRUITS OF A CRIMINAL GRAND JURY'S INVESTIGATION AS A MATTER OF ABSOLUTE RIGHT IMPERMISSIBLY VIOLATES FUNDAMENTAL POLICIES OF GRAND JURY SECRECY

The pervasive thread running through all of this Court's decisions respecting a party's right of access to grand jury materials is that keeping the proceedings of the grand jury secret is of paramount importance to the effective functioning of that body:

> This Court has recognized the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts." United States v. Procter & Gamble, 356 U.S. 677, 681. And it has ruled that, when disclosure is permitted, it is to be done

"discretely and limitedly." Id. at 683.

Dennis v. United States, 384 U.S. 855, 869 (1966). See also Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979) ("courts have been reluctant to lift unnecessarily the veil of secrecy from the grand jury"); United States v. Procter & Gamble, Co., 356 U.S. 677, 682 (1958) ("This 'indispensible secrecy of grand jury proceedings,' United States v. Johnson [319 U.S. 503] at 513, must not be broken except where there is a compelling necessity"); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399, reh. denied 361 U.S. 855 (1959).

Here, adoption of the Government's theory of Rule 6(e)(3)'s operation would make a hollow platitude

of this Court's pronouncements respecting the importance of keeping the grand jury's operations secret. The Government does not seek to lift the veil of grand jury secrecy "discretely and limitedly," upon a showing of "compelling necessity." On the contrary, the Government urges that it has an absolute right to rent the veil savagely and wantonly, and that all transcripts and all documents before the grand jury be made available in every case under any circumstance upon no showing whatsoever. On its face such a proposal falls outside any acceptable boundaries for the limited dissemination of grand jury materials demanded by this Court and must be rejected.

In United States v. Proctor & Gamble, Co., 356 U.S. 677, 681-82

n.6 (1958), the Court set forth the policies underlying grand jury secrecy:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

The Government attempts to dismiss these principles, contending they

are largely "inapposite" to disclosure of grand jury materials to a Civil Division attorney (Brief for the United States, p. 33.) It is surprising the Government so strongly asserts such a manifestly inaccurate position. The policies undergirding the traditional secrecy of a grand jury certainly apply to the subject of a grand jury investigation against whom no indictment is brought, and the fear that any testimony given before a grand jury could be revealed in future civil, as well as criminal, litigation might well put a damper on the "free and untrammeled disclosure" of a witness' knowledge of allegedly crimnal activity. Thus, the policies behind grand jury secrecy must be taken into account in making the determination as to whether a Civil Division attorney should have access to secret grand jury documents.

In other words, Proctor & Gamble requires that the Government, like any other civil party, must show that its need for grand jury materials outweighs the need for the continued secrecy of those documents, and that a Civil Division attorney should not be granted wholesale access to such materials without a proper balancing of all the relevant and competing interests relating to their disclosure./11/

11/ The Government also contends that grand jury secrecy will not be abrogated by full scale disclosure to the Civil Division because, as attorneys employed by the Department of Justice, they are "well aware of their professional and legal obligations not to breach grand jury secrecy . . . "(Brief for the United States, pp. 33-34). This argument is also unconvincing since every attorney must be presumed aware of the obligation not to breach grand jury secrecy, and yet a private party's counsel has no absolute ex parte right inspect grand jury materials. See Douglas Oil Co. v. Petrol Stops Northwest, supra.

The Government's analysis of Procter & Gamble is unavailing for other reasons as well. In its brief, the Government quotes liberally from Procter & Gamble's dicta indicating that, under certain circumstances, the Government's use of grand jury materials in civil litigation does not run afoul of traditional secrecy notions (Brief for the United States, pp. 18-19). However, the question presented here is not whether it is ever permissible for the Civil Division's attorneys to have access to grand jury documents, but rather when and under what circumstances is it appropriate to grant them such access./12/ Procter & Gamble did

12/ The misplaced focus of the Government's analysis on this issue is evidenced by its conclusion of Procter & Gamble's reach:

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not authorize carte blanche access to grand jury materials by the Civil Division. In fact, it did not even purport to address the standards which civil Governmental attorneys must meet in order to secure access to such

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> Given the Court's recognition of the role of Rule 6(e) and its rejection of appellees' contention that the government had violated the rule of grand jury secrecy, Procter & Gamble must fairly be interpreted to approve civil use of grand jury materials by government attorneys as consistent with Rule 6(e).

Brief for the United States, p. 19.

materials./13/ Hence, despite the Government's protestations to the

13/ At one point in its brief, the Government seems to recognize that Procter & Gamble deals only with the "use" of grand jury materials by the Civil Division and not with the standards governing such use (Brief for the United States, p. 20). However, even there the Government does not address the central question of whether grand jury secrecy is impermissibly breached upon the disclosure of grand jury documents to Civil Division attorneys as a matter of right. Instead, immediately after raising this issue, the Government embarks on discussion of whether Proctor & Gamble can fairly be read to turn on attorney assignment patterns within the Department of Justice. Not only does such discussion stray far from the question presented by this case, but it turns the proper analysis of the issues on its head. The Government suggests that the question of whether disclosure of grand jury materials to Civil Division attorneys violates important principles of grand jury secrecy depends, in part, on the current internal deployment of attorneys by the Attorney General (id.). This surely cannot be the case. If the current assignment patterns of Attorneys leads to the improper violation of grand jury

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contrary, Procter & Gamble cannot be cited for the proposition that this Court has implicitly decided that acquisition of grand jury documents by a Civil Division attorney can never impermissibly intrude on the secrecy of grand jury

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secrecy, those patterns will have to be changed, not the other way around (Brief for the United States, p. 19).

The Government also contends that a decision requiring a Civil Division attorney to seek leave of court before gaining access to grand jury documents ultimately will frustrate the policies of grand jury secrecy since it will result in only one individual United States Attorney being assigned the responsibility of prosecuting both civil and criminal actions arising from the same set of facts (Brief for the United States, pp. 34-35). This argument too is unavailing. Even if a United States Attorney remembers some of the information uncovered while he or she is legitimately present during grand jury hearings, no reason exists thereafter to permit that attorney wholesale access to the documents and sworn testimony of witnesses appearing before the grand jury, either for use at trial or for use during civil discovery.

proceedings, or that an attorney for the Civil Division is entitled to inspect any or all grand jury materials as a matter of right. Accordingly, because the Government's interpretation of Rule 6(e) could only lead to unacceptable breaches of the grand jury's traditional secrecy on a regular basis, the decision below should be upheld and the Government denied wholesale access to a grand jury's documents when prosecuting a civil action.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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November 12, 1982.

Amicus Brief

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Office - Supreme Court, U.S.
FILED
AUG 4 1982
ALEXANDER L. STEVAS,

No. 81-1032

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,

Petitioner,

-v.-

SELLS ENGINEERING, INC., ET AL.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE DISTRICT ATTORNEY OF SUFFOLK COUNTY, NEW YORK, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1032

UNITED STATES OF AMERICA,

Petitioner,

-v.-

SELLS ENGINEERING, INC., ET AL.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

BRIEF FOR THE SUFFOLK COUNTY, NEW YORK, DISTRICT ATTORNEY *AMICUS-CURIAE*

INTEREST-of-AMICUS*

The question of a litigant utilizing the transcriptions of grand jury proceedings in a civil proceeding after obtaining requisite court approval is not novel. Cases concerning such applications have been reported frequently, but only in recent years have applications by prosecutors' offices for use in civil forums been forthcoming. Accordingly, the New York Court of Appeals has established general criteria for the release of grand jury minutes, but has yet to speak decisively on the issue of use within an agency.

*The filing of this brief is pursuant to Rule 36(4) of the Court.

Prosecutors on all levels — county, state and federal — have increasingly recognized the therapeutic value of civil remedies. No longer satisfied to impose criminal sanctions against the wrongdoer, municipal attorneys are now seeking to return to the public treasury the ill-gotten gains of those who would corrupt our institutions. Toward this end, Patrick Henry, District Attorney of Suffolk County, on behalf of the County of Suffolk, State of New York, as outlined below, initiated a 260 million dollar fraud action pursuant to the Racketeer Influenced and Corrupt Organizations Act of the Organized Crime Control Act of 1970 (RICO) [18 U.S.C. 1961, et seq.]. The suit claims damages arising out of corruption and kickbacks in connection with the construction of a billion dollar public works project known as the Southwest Sewer District, as well as recission of certain contracts. Suffolk County, a municipal corporation located at the eastern end of Long Island, New York, with a population of approximately 1.3 million, is attempting to relieve the financial burden on district and county taxpayers created by the wrongful conduct alleged in the suit.

This RICO action, as it relates to the use of state grand jury transcripts, is directly analogous to the case, sub judice. Litigation concerning the use of said transcripts, entitled *In the Matter of the District Attorney of Suffolk County* (Amicus Appendix at i) is presently pending before the New York Court of Appeals.

The broad policy question presented herein is whether the government on any level may properly use grand jury transcripts under court supervision to seek the return of public monies illegally converted to private fortune. The answer must be a loud and resounding yes.

This Court's analysis of the criteria for release of grand jury minutes upon application by the United States Attorney pursuant to Section 6 (e) of the Federal Rules of Criminal Procedure is of grave concern to local and state municipal corporations, as similar orders have been and will be sought by their attorneys from state courts for release of grand jury minutes in analogous circumstances. Such disclosure orders will affect the litigation programs for local governmental entitities nationwide.

THE SUFFOLK DISTRICT ATTORNEY RICO LITIGATION

On January 27, 1981, pursuant to New York County Law Section 700, subd. 1*, Patrick Henry, District Attorney of Suffolk County, New York, applied to the Suffolk County Legislature and received authority and power to "prosecute and defend in certain civil actions brought by or against the County pursuant to 18 U.S.C. 1961, et seq., of the Organized Crime Control Act a/k/a Racketeer Influenced [and] Corrupt Organizations Act and under the state and federal, common and statutory law."**

Subsequent to this formal approval by the Suffolk County Legislature, an application was made by the District Attorney to the County Court: Suffolk County (Doyle, J.), for permission of the Court

*This statute provides in relevant part: "It shall be the duty of every district attorney to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he shall have been elected or appointed. . . He shall perform such additional and related duties as may be prescribed by law and directed by the board of supervisors."

**A state declaratory judgment challenge to this local law was granted by the New York Supreme Court: Suffolk County.

to utilize, pursuant to N.Y.C.P.L. Section 190.25, subd. 4, the grand jury transcripts of the February, 1980 grand jury in a civil action to be filed on behalf of the County of Suffolk pursuant to 18 U.S.C. 1961, et seq., of the Racketeer Influenced and Corrupt Organization Act of the Organized Crime Control Act of 1970 (RICO). The Court granted this request on January 27, 1981.

On the same date, pursuant to specific direction of the chief executive officer of Suffolk County, Peter F. Cohalan, an assistant district attorney acting as a special assistant county attorney filed a RICO complaint on behalf of Suffolk County in its own name and as trustee in fact for the United States of America. The action was brought against ten (10) defendants, including sewer contractors as well as former political and elected officials of the county in the United States District Court for the Eastern District of New York.

On March 4, 1981, eight (8) of the ten (10) defendants named in the RICO suit moved in the County Court: Suffolk County Court for an order:

> "vacating and setting aside an *ex parte* Order of this Court (Doyle, J.) dated January 27, 1981, which authorized and permitted, "the District Attorney of Suffolk County, his appointed staff, special counsel, experts and consultants . . . to utilize the grand jury transcripts of the Suffolk County Grand Jury proceeding enumerated 453-80 in the litigation of a civil proceeding and proceedings pursuant to 18 USC 1961, et seq., State and Federal Common Statutory Law."

After receiving written submissions and hearing oral argument, the County Court by order and decision dated May 20, 1981, denied the RICO defendants' application for the vacatur of its January 27, 1981 order. It renewed the Court's previous position granting permission for utilization of the transcript in question, but granted a stay of the effectiveness of this order until the transcripts "have been properly disclosed at a perjury trial, or the prospective criminal proceedings concluded."* (Amicus Appendix at vi).

In September 1981, subsequent to the cross-designation of two Suffolk County assistant district attorneys as special New York State assistant attorneys general, an amended complaint was filed in the District Court to reflect the entry of the State of New York as a party-plaintiff in the RICO suit.

On May 10, 1982, the Appellate Division of the New York State Supreme Court for the Second Judicial Department reversed the County Court decision on the ground that the District Attorney had failed to make an adequate showing warranting the lower Court's permission to utilize and transfer the grand jury minutes for use in civil litigation (Amicus Appendix at i).

*Certain named defendants were the subject of parallel criminal proceedings then pending.

SUMMARY OF ARGUMENT

Government attorneys are under a duty to pursue a dual role as criminal prosecutor as well as civil advocate. Their ability to seek civil redress will be irreparably damaged by restrictive standards of access to grand jury transcripts. The public interest self-evident in the vigorous enforcement of our collective rights by the government through its attorneys must be strengthened. A distinction must be recognized between the private litigant seeking purely personal remedies and the governmental agency charged with an official responsibility. The standard for the disclosure of grand jury minutes to government attorneys for use in civil litigation should be the pragmatic, practical approach set forth in *In re Grand Jury*, 583 F. 2d 128 (5th Cir. 1978), to wit: whether the grand jury materials sought are rationally related to civil matters within the duty of government lawyers.

ARGUMENT

INTRA-OFFICE ACCESS TO GRAND JURY TRANSCRIPTIONS BY AUTHORIZED GOVERNMENT ATTORNEYS (STATE OR FEDERAL) FOR USE IN CIVIL LITIGATION SHOULD BE PERMITTED EITHER AS A MATTER OF STATUTORY AUTHORIZATION WITHOUT PRIOR JUDICIAL APPROVAL OR ON A REALISTIC DEMONSTRATION OF NECESSITY COMMENSURATE WITH THE CIRCUMSTANCES OF THE PROCEEDING.

In New York, any order of the Court releasing grand jury minutes pursuant to New York Criminal Procedure Law Section 190.25, subd. 4 is a dis-

cretionary one. See *People v. DiNapoli*, 27 N.Y. 2d 229, 234-235 (1970); *Matter of Quinn*, 293 N.Y. 787 (1944) (construing former New York Code of Criminal Procedure 952-t); *People v. Sweeney*, 213 N.Y. 37, 42 (1914); *Matter of City of Buffalo*, 57 A.D. 2d 47, 49 (4th Dept. 1977); *Matter of Scotti*, 53 A.D. 2d 282, 286-287 (4th Dept. 1976); New York Judiciary Law Section 325. It is reasonably viewed as an order attendant to the grand jury proceeding thereby within the Court's "liberty or privilege to decide and act in accordance with what is fair and equitable under the peculiar circumstances of the particular case, [and] guided by the spirit and principles of the law" [*Manekas v. Allied Siaxnour Co.*, 6 Misc. 2d 1079 (Sup. Ct. Kings Co. 1957); *Grelski v. State of New York*, 173 Misc. 1004 (Ct. Cl. 1940), aff'd. 261 App. Div. 879 (4th Dept. 1941)]. Hence, any party contesting the efficacy of such an order clearly has a heavy burden of pursuasion that it was erroneously granted and that it ran contrary to the presumption of regularity attendant to such matters.

Historically, New York has formally recognized the secrecy of grand jury proceedings from at least the enactment in 1909 of Section 952-t of the New York Code of Criminal Procedure Law, the predecessor to the current New York Criminal Procedure Law.* Nonetheless, in *Matter of Crain*, 139 Misc. 799, 800 (Ct. Gen. Sess. 1931), the Court granted

*This law provided: Stenographers' duties. It shall be lawful for any stenographer duly appointed and qualified as hereinbefore provided, to attend and be present at the session of every grand jury impaneled in the county in which he is appointed, and it shall be his duty to take in shorthand or upon a typewriting machine the testimony introduced before such grand juries, and *1/* except when his original notes and minutes and the exhibits pertaining thereto have been impounded as hereinafter provided for, *1/* to furnish to

[Footnote continued on page 8]

permission to a commissioner, appointed to conduct an investigation of the New York County District Attorney, to receive grand jury minutes on a "public interest basis," in spite of the fact that the proceeding to be assisted thereby "did not involve a . . . criminal action." Id. See also, *Matter of Scro*, 200 Misc. 688 (Co. Ct. Kings Co. 1930). This first "in furtherance of criminal investigations" exception to the rule prohibiting disclosure was followed in several cases, particularly in *Matter of Attorney General of the United States*, 160 Misc. 533 (Co. Ct. Kings Co. 1936); *People v. Behan*, 37 Misc. 2d 911 (Co. Ct. Onondaga Co. 1962); *Matter of the Temporary State Commission of Investigation*, 47 Misc. 2d 11 (Co. Ct. Nassau Co. 1965); and *People v. Werfel*, 82 Misc. 2d 1029 (Sup. Ct. Queens Co.

[Footnote continued from page 7]

the district attorney of such county a full copy of all such testimony as such district attorney shall require, *but he shall not permit any other person to take a copy of the same, nor of any portion thereof, nor to read the same, or any portion thereof, except upon the written order of the court duly made after hearing the said district attorney 2/* provided, however, that the judge presiding over the term of court for which any grand jury is drawn, may at any time during the sitting of such grand jury and upon petition signed by its foreman or acting foreman and certified by its clerk to have been authorized by twelve or more of the grand jurors constituting such grand jury, impound the stenographer's original notes and minutes and the exhibits pertaining thereto, or any portion of such original notes, minutes, and exhibits, and may order them to be delivered to him and placed in his custody or in the custody of a public officer named by him. When so impounded, such original notes, minutes, and exhibits shall not be taken from the custody of such judge or such public officer except upon the order of such judge, who, upon the written requisition of the foreman or acting foreman of such grand jury, shall deliver them or order them to be delivered to such foreman or acton[ing] foreman for use in the grand jury room during the hours when the grand jury is actually in session. Except as above provided, all of the said original notes and minutes shall be kept in custody of said district attorney, and neither the same, nor a copy of the same, or any portion of the same, shall be taken from the office of said district attorney, excepting as above provided. *3/* Nothing contained in this section, however, shall be construed to prohibit a grand jury from inspecting its own minutes and exhibits while in session. (emphasis supplied) This section is continued in full force in section 325 of the New York Judiciary Law.

1975). The Courts required a mere showing of some "necessity" to further the public interest. Compare, *People v. Doe,* 103 Misc. 2d 524 (Sup. Ct. N.Y. Co. 1980). The facts required to demonstrate such a need were simply that a stated "public interest" would be served by such utilization, which could on balance vitiate the need for continued secrecy [e.g., *Matter of the Temporary State Commission of Investigation,* supra, at 14] or that such materials were merely "necessary" [*Matter of Crain,* supra], or "essential" [*People v. Behan,* supra], to further the investigation and fulfill a particular government duty. In sum, the general public good must be advanced by the release and use of the transcripts.

Collateral to this exception has been the expanding permission by the New York Courts for various public agencies to obtain disclosure of grand jury minutes in furtherance of a specified public interest and the efficient exercise of regulatory or administrative functions. *People v. DiNapoli,* supra [Public Utility Commission]; *Matter of Scotti,* supra [Corrections Department]; *In the Matter of Epstein,* 37 A.D. 2d 333 (1st Dept. 1971) [Bar Association]; *Application of City of New Rochelle,* 35 Misc. 2d 254 (Co. Ct. Westchester Co. 1962) [Police Department]; *People ex rel. Sawpit Gymnasium,* 60 N.Y.S. 2d 593, 594 (Sup. Ct. West. Co. 1946) (N.O.R.) [Village Officials]. Indeed in *Matter of Quinn,* supra, the New York Court of Appeals permitted the inspection of grand jury minutes by the private residents of a town who were seeking to remove their Town Receiver of Taxes on the ground of negligence.

As is the case with the analogous Federal Rule of Criminal Procedure 6(e),* New York Criminal Law 190.25, subd. 4 provides:

> Grand Jury proceedings are secret, and no grand juror or other person specified in subdivision three [as relevant, the District Attorney] may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, or any decision, result or other matter attending a grand jury proceeding.

New York Penal Law Section 215.70 moreover states:

> A person is guilty of unlawful grand jury disclosure when, being a grand juror, a public prosecutor, a grand jury stenographer, a grand jury interpreter, a peace officer guarding a witness in a grand jury proceeding, or a clerk, attendant, warden or other public servant having official duties in or about a grand jury room or proceeding, he intentionally discloses to another the nature or substance of any grand jury proceeding which is required by law to be kept secret, except in the proper discharge of his official duties or upon written order of the court.
> Unlawful grand jury disclosure is a class B misdemeanor.

*We note that the New York Court of Appeals in *DiNapoli*, supra, at 237, n.4, has called the rule of law in New York regarding grand jury disclosure "broader" than that permitted in the federal system.

In *People v. DiNapoli,* supra, at 235, the New York Court of Appeals first formally outlined the relevant factors to be weighed in any application for the outright release or publication of grand jury minutes. These are: (1) prevention of flight by a defendant who is about to be indicted; (2) protection of the grand jurors from interference from those under investigation; (3) prevention of subornation of perjury and tampering with prospective witnesses at the trial to be held as a result of any indictment the grand jury returns; (4) protection of an innocent accused from unfounded accusations if in fact no indictment is returned; and (5) assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely. These criteria are, of course, those first outlined by this Court in *United States v. Proctor & Gamble Co.,* 356 U.S. at 681, n. 6.

Consistent with the Ninth Circuit requirement in the case sub judice of a showing of a "particularized and compelling need" for disclosure [Citing, e.g., *Douglas Oil Co. v. Petrol Stops Northwest,* 441 U.S. 211, 222-223 (1958); *U.S. Industries v. United States District Court,* 345 F. 2d 18, 21 (9th Cir.), cert. denied, 382 U.S. 214 (1965)] one New York Appellate Court has recently required that in balancing the above elements, the party seeking release:

> "upon a claim that they are necessary for the enforcement of a public interest . . . [must show] by sufficient facts that the interest asserted is of such import that it outweighs the damages inherent in violation of the secrecy of the Grand Jury [cite omitted] and that the minutes of the Grand Jury proceedings are requisite to a

successful effort to protect or vindicate that interest."

In order to make such a demonstration, the litigant now in New York must specifically show:

> "why and to what extent he requires the minutes of a particular Grand Jury to advance the actions or measures taken or proposed (e.g., legal actions, administrative inquiry or legislative investigation) to insure that the public interest has been, or will be served." *In the Matter of the District Attorney of Suffolk County, supra.* (Amicus Appendix at i)

Our position, like that of the government herein, is that such a standard for intra-prosecutor's office transfer for utilization of grand jury minutes for civil litigation is both unrealistic and impractical and not based on either existing federal or state statutory or case law. It is tied to outmoded notions of the role of the government and its lawyers. Counsel for government agencies must now be as creative as the private bar in pursuing the rights of its client, the taxpaying citizen of our country. To construct barriers to pursuing these remedies can only frustrate public interest and reward those that wrongfully obtain monies, particularly where judicial review prior to use can protect the traditional need for secrecy by grand jury proceedings.

A. *Intra-Office Access to Grand Jury Minutes by Government Attorneys*

The Government maintains that an attorney serving in the Civil Division of the United States Department of Justice engaged in preparing a civil action on behalf of the Government is "an attor-

ney for the government . . . perform[ing] . . . such attorney's duty" within the meaning of Federal Rule of Criminal Procedure 6(e) (3) (A) (i) and, accordingly, is entitled to utilize relevant grand jury material without judicial authorization. Similarly, New York Penal Law 215.70 and New York Judiciary Law Section 325 do not prohibit the intra-office "use" by attorneys within the same governmental office of grand jury minutes in the "lawful discharge" of a New York prosecuting attorney's duties. The implicit rule of State law would appear to permit access to minutes where mere intra-mural utilization and outright publication in civil litigation is desired. Thus, in *People v. Cutler,* Ind. No. 48504/1980 (Co. Ct. Nassau Co. 1980) (N.O.R. Amicus Appendix xviii), the Court specifically ruled that since "such a transfer was in the lawful discharge of the duties of . . . [such a prosecutor], no order of this court is necessary." Such a ruling would conform to the "principles of attribution," according to which all members of a prosecutor's office or law firm are considered to act as a single entity. See *Cardinale v. Golinello,* 43 N.Y. 2d 288, 296 (1977), *People v. Shinkle,* 51 N.Y. 2d 417 (1980). There is, quite obviously, no rule of law which requires a prosecutor's office to obtain a Court order before communicating with itself. Compare *Matter of Aswad v. Hynes,* 80 A.D. 2d 382, 384 (3rd Dept. 1981) [dictum]. It would only be common sense that New York State government attorneys* with statutory duties and formal access to grand jury minutes have a right to the civil use in the perfor-

*These include the New York Attorney General and the New York Deputy Attorney General for Medicaid Fraud and the New York Deputy Attorney General in Charge of the Organized Crime Control Task Force, along with the District Attorney.

mance of their official duties even absent any judicial approval. Any claims regarding grand jury abuse can be dealt with, not on a prospective basis, but on a case-by-case review of the circumstances regarding the particular proceeding. See *Robert Hawthorne, Inc. v. Director of Internal Revenue,* 406 F. Supp. 1098, 1118 (E.D. Pa. 1975).

B. ***The Standard For Disclosure of Grand Jury Minutes To Government Attorneys For Use In Civil Litigation***

Consistent with the federal and New York criteria outlined for disclosure discussed, supra, there exists a sufficient and practical standard for such disclosure as outlined by the Fifth Circuit in *In re Grand Jury,* 583 F. 2d 128, 131 (5th Cir. 1978), [i.e. whether "the grand Jury materials sought are rationally related to civil matters within the duty of an attorney for the government"] or the New York Court of Appeals in *People v. DiNapoli,* 27 N.Y. 2d 229, 234 (1970) [whether the "public interest would be best served" by disclosure based on a plain showing that such disclosure would further the government's interest]. This standard permits a more realistic basis of demonstration for use by the state or federal government attorney charged with the pursuit of enforcement of civil statutory remedies. This standard should be, of course, contrasted with that required for private litigants where outright and effective public disclosure (and not mere internal transfer) is sought. [See e.g., *Golden v. City of New York,* ___ Misc. 2d ___ (Sup. Ct. Queens Co. 1981) (12/21/81 N.Y.L.J., p. 15 col. 1); *People v. Carigan,* 76 Misc. 2d 515, 516 (Sup. Ct. Alb. Co. 1973); *Marinelli v. State,* 71 Misc. 2d 62, 63 (Ct. Cl. 1974); cf., *Zinna v. Rensellear County Grand Jury,* 63 A.D. 2d 80 (3rd Dept. 1978);

Albert v. Zahners Sales, 81 Misc. 2d 103, 106 (Sup. Ct. Queens Co. 1975); *Vortanesion v. Purcell*, 51 Misc. 2d 217 (Sup. Ct. Ren. Co. 1968).] While the New York Courts have only reported two decisions concerning the use of grand jury minutes by authorized prosecutorial attorneys engaged in civil litigation [*In the Matter of the District Attorney of Suffolk County; Aswad v. Hynes*, supra], there have been numerous unreported decisions in which approval for such intra-office transfer has been obtained.*

**In the Matter of the Application of the Office of the Special State Prosecutor for Nursing Homes, Health and Social Services Office of the Special State Prosecutor to release Grand Jury testimony to the Office of the Special State Prosecutor for Nursing Homes, Health and Social Services-Civil Recovery Unit, the Internal Revenue Service of the United States and the New York State Department of Taxation and Finance.* (Indictment #560-77, 561-77, 616-78) (Co. Ct. Suffolk Co. 1979) (April 19, 1979); *In the Matter of the Application of the Office of the Deputy Attorney General for Medicaid Fraud Control for an order authorizing the use of certain evidence adduced before the Grand Jury of the May 5, 1976 Term of the County Court of the County of Rockland.* (Co. Ct. Rockland Co. 1980)
(McNab, J.) (July 22, 1980); *In the Matter of the Application of Charles J. Hynes for an Order Releasing Documents Submitted by the Morris Park Nursing Home and Related Entities Pursuant to a Grand Jury Subpoena Duces Tecum, Reports Prepared by the Office of the Special State Prosecutor for Nursing Homes, Health and Social Services, and Testimony Relating to the Subpoenaed Records of the Morris Park Nursing Home & Related Entities* (Sup. Ct. N.Y. Co.)
(Melia, J.); *In the Matter of the Application of the Office of the Special New York State Prosecutor for Nursing Homes, Health and Social Services, for an Order Releasing Documents Concerning Di-Com Corporation Submitted Pursuant to a Grand Jury Subpoena Duces Tecum,* (Sup. Ct. Queens Co. 1978) (Balbach, J.); *In the Matter of the Application of the Office of the Special State Prosecutor for Nursing Homes, Health and Social Services ("Deputy Attorney General") for an order authorizing the use of the evidence adduced before the Regular and Special Terms Grand Juries, County of*

[Footnote continued on page 16]

Indeed even those decisions applying the so-called New York *DiNapoli* standard for release of grand jury minutes to governmental attorneys involved in civil litigation on behalf of non-prosecutor's offices have utilized such a standard e.g., *Matter of Corporation Counsel*, 61 A.D. 2d 32, 37 (4th Dept. 1978); *Matter of City of Buffalo*, supra; see also *People v. Doe*, ___ Misc. 2d ___ (Sup. Ct. N.Y. Co. 1980).

[Footnote continued from page 15]

Kings for the April 1975 Regular Term and the Special Term of the Kings County Supreme Court, (Sup. Ct. Kings Co. December 13, 1978) (Thompson, J.); *In the Matter of the Application of the Office of the Special State Prosecutor for Nursing Homes, Health and Social Services ("Deputy Attorney General") for an Order Authorizing the Use of the Evidence, Testimony and Exhibits Adduced before the March Third Additional 1976 Grand Jury for the County of Queens*, (Sup. Ct. Queens Co. December 4, 1978) (Balbach, J.); *In the Matter of the Application of the Office of the Special State Prosecutor for Nursing Homes, Health and Social Services ("Deputy Attorney General") for an Order Authorizing the Use of the Evidence, Testimony and Exhibits Adduced before the Third March Additional 1976 Grand Jury for the County of Queens*. (Sup. Ct. Queens Co., January 9, 1979) (Balbach, J.); *In the Matter of the Application of the Office of the Special State Prosecutor for Nursing Homes, Health and Social Services (Deputy Attorney General of the State of New York) for an Order Authorizing the Use of the Evidence, Testimony and Exhibits Adduced before the Fifth Grand Jury of the July, 1978 Term of the Supreme Court of the State of New York for the County of New York*, (Sup. Ct. N.Y. Co. February 14, 1979) (McQuillan, J.); *In the Matter of the Application of the OFFICE OF THE SPECIAL PROSECUTOR FOR NURSING HOMES, HEALTH AND SOCIAL SERVICES ("Deputy Attorney General") for an ORDER Authorizing the Use of the Evidence Adduced before the Grand Jury of the April "C", 1977 Term of the County Court of the County of Westchester*, (Co. Ct. West. Co., May 18, 1979) (Couzens, J.); *In the Matter of the Application of the Office of the Special State Prosecutor for Nursing Homes, Health and Social Services ("Deputy Attorney General") for an Order Authorizing the Use of the Evidence, Testimony and Exhibits Adduced before the Regular Grand Jury, County of Kings, for the May, 1976 Regular Term of the Kings County Supreme Court*, (Sup. Ct. Kings Co. September 12, 1979) (Donnelly, J.).

As the government maintains the Ninth Circuit did in *Sells*, and we assert the New York Appellate Division did in *Application of the Suffolk County District Attorney*, those courts failed to properly weigh the per se substantial public interest evident in redressing fraud in civil proceedings brought under statutes containing civil provisions such as RICO. Thus, any application by the Court of the standard enunciated by the Ninth Circuit in this case, or the Second Circuit recently in *Connecticut v. Cuisinarts, Inc.*, ____F. 2d____ (2nd Cir. 1981) is in stark contrast with the more reasonable and realistic criteria established in *In re Grand Jury (LTV)*, 583 F. 2d 128, 131 (5th Cir. 1978); see also *In re Grand Jury Subpoenas*, 581 F. 2d 1103, 1110, (4th Cir. 1978), cert. denied, 440 U.S. 971 (1979). The limited disclosure of minutes in the public interest within the confines of a single governmental agency (state or federal) raises few of the questions traditionally related to grand jury secrecy. Thus, the Ninth Circuit decision herein failed to consider "the character of the party seeking inspection, the nature of the inquiry involved and the results of the grand jury investigation [*People v. DiNapoli*, supra at 238]. As such, standards of review of such orders should militate in favor of intra-governmental disclosure. The alternative is a wasteful duplication of taxpayer's services. It would suggest a scenario where one unit of the same prosecutor's office is unable to communicate with the other, even on a confidential basis, consistent with the basic performance of its public duties.

CONCLUSION

INTRA-OFFICE ACCESS TO GRAND JURY TRANSCRIPTIONS BY AUTHORIZED GOVERNMENT ATTORNEYS (STATE OR FEDERAL) FOR USE IN CIVIL LITIGATION SHOULD BE PERMITTED EITHER AS A MATTER OF STATUTORY AUTHORIZATION WITHOUT PRIOR JUDICAL APPROVAL OR ON A REALISTIC DEMONSTRATION OF NECESSITY COMMENSURATE WITH THE CIRCUMSTANCES OF THE PROCEEDING.

Rather than creating barriers to the vigorous enforcement of the government's rights, the Court should encourage the effort of the Justice Department to energetically pursue all avenues of statutory redress. Carefully monitored by the exercise of sound judicial discretion, the public interest in permitting the transfer and access of grand jury minutes within our governmental agencies must be not only approved but promoted.

Absent willful malice or a specific showing of bad faith, counsel for the government must be supplied the tools required to repair the public institutions eroded by fraud and corruption.

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SUPREME COURT: APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

MANGANO, J. P., WEINSTEIN, THOMPSON and BRACKEN, JJ.

In the Matter of the District Attorney of Suffolk County.

APPEAL by the movants from so much of an order of the County Court, Suffolk County (ROBERT W. DOYLE, J.), dated May 20, 1981, as denied their motion to vacate an ex parte order of the same court, dated January 27, 1981, which authorized and permitted the District Attorney of Suffolk County, his appointed staff, special counsel, experts and consultants, "to utilize the Grand Jury transcriptions of the Suffolk County Grand Jury proceeding enumerated 453-80 in the litigation of a civil proceeding and proceeding brought pursuant to 18 U.S.C. 1961 *et seq* and state and federal common and statutory law."

MANGANO, J. P. In 1979 and 1980, several businessmen, construction and engineering firms, elected officials, and political figures were examined before various Suffolk County Grand Juries investigating possible fraud, bribery and political corruption associated with the planning and construction of a sewer project in the southwestern part of Suffolk County, known as Southwest Sewer District No. 3. The last of these Grand Juries, the February, 1980 Grand Jury III, investigated the allegedly illegal payment of cash contributions by contractors to political figures

and elected officials in Suffolk County. The only indictments filed by the February, 1980 Grand Jury III were those against Nicholas Barbato, Charles T. Walsh and Regis O'Neil, three of the movants herein and the only movants to have testified before that Grand Jury. Barbato, Walsh and O'Neil were charged in three separate indictments with perjury in the first degree in that they allegedly gave false testimony of a material nature before the Grand Jury. No indictments were filed by the February, 1980 Grand Jury III charging any crime involving fraud or corruption directly related to the subject matter of its investigation.

On January 27, 1981 the Suffolk County Legislature enacted Local Law No. 8 of 1981, which empowered the District Attorney of Suffolk County to act as attorney and counselor for the county in any civil action for damages in connection with the planning, financing or construction of Southwest Sewer District No. 3. On the same date, the County Court of Suffolk County (DOYLE, J.), pursuant to CPL 190.25 (subd 4), granted an ex parte motion brought by the District Attorney in accordance with his authority under Local Law No. 8 of 1981, and ordered that the District Attorney, his appointed staff, special counsel, experts and consultants be authorized and permitted to utilize the minutes of the February, 1980 Grand Jury III. This order was granted in contemplation of the county's commencement of a civil action in the United States District Court for the Eastern District of New York, pursuant to the Federal "RICO" statute (Racketeer Influenced and Corrupt Organizations, US Code, tit 18, § 1961 *et seq.*) Such an action was commenced. The complaint, dated January 27, 1981, accused each of the movants of having par-

ticipated in the fraud, bribery and political corruption associated with the planning and construction of Southwest Sewer District No. 3.

The instant motion was brought to vacate the ex parte order of January 27, 1981. In its affidavit in opposition to this motion, as in its affidavit in support of its application for the ex parte order, the county made the following showing:

> (1) that the February, 1980 Grand Jury III had been impaneled and did investigate corruption concerning the Southwest Sewer District No. 3;
>
> (2) that Barbato, Walsh and O'Neil had been indicted by that Grand Jury for perjury and that those indictments were pending;
>
> (3) that the District Attorney had been authorized by Local Law No. 8 of 1981 to prosecute a civil action for damages with regard to the corruption associated with the sewer project;
>
> (4) that the county had commenced such an action in Federal District Court under the "RICO" statute; and
>
> (5) that in order to prosecute this Federal civil action, it was necessary that the minutes of the February, 1980 Grand Jury III be released to the county pursuant to CPL 190.25 (subd 4).

Specifically, on the question of its need for the minutes, the county stated, without more, in its affidavit in support of the ex parte application for their release, that the "transcripts are required and necessary in the interests of justice" and that "the interests of justice, the need to remedy civil wrongs against this municipality and the protection of the public interest dictates [*sic*] authority for the utili-

zation of these minutes". Similarly, in its affidavit in opposition to the instant motion, the county simply averred that "the narrow claim of Grand Jury secrecy raised herein [must] bow to permission to utilize these minutes in furtherance of a most important public interest: the integrity of our local government system." Again, on the oral argument of the instant motion in the County Court, the county merely stated that the public interest to "take the profit out of kickbacks and payoffs, and bribery" created a "compelling necessity" for the use of the Grand Jury minutes "to secure justice".

It should be noted that at the same oral argument in the County Court, the county conceded that, in addition to Barbato, Walsh and O'Neil, who gave Grand Jury testimony, the other movants herein were discussed by the February, 1980 Grand Jury III.

The motion to vacate the ex parte order of January 27, 1981 was granted by the County Court to the extent that the ex parte order permitting disclosure of the minutes of the February, 1980 Grand Jury III was stayed pending proper disclosure of those minutes at the perjury trials of Walsh, Barbato or O'Neil, or pending the conclusion of said criminal proceedings.

The movants now appeal this order insofar as it effectively denied their motion to vacate the January 27, 1981 ex parte order. We reverse.

As a threshold determination, we must decide whether each of the movants has standing to challenge the disclosure of the minutes of the subject Grand Jury. We conclude that each does. The purpose of Grand Jury secrecy is the "protection of an innocent accused from unfounded accusations if in

fact no indictment is returned", as well as the protection of witnesses (*People v Di Napoli,* 27 NY2d 229, 235). The targets of a Grand Jury investigation therefore, as well as the witnesses before the Grand Jury, have standing to enforce the right of Grand Jury secrecy established by statute (CPL 190.25), since the injury suffered by each due to the violation of that secrecy falls within the zone of interest to be protected by the statute (*Matter of Fritz v Huntington Hosp.,* 39 NY2d 339, 346; See *Douglas Oil Co. of California v Petrol Stops Northwest,* 441 US 211, 218, n 8). In the case at bar, Barbato, Walsh and O'Neil have standing, as witnesses, to challenge the disclosure of the minutes of the February, 1980 Grand Jury III. They also have standing, with the other movants, as targets of the subject Grand Jury's investigation. The record reveals that all of the movants were discussed in the course of the investigation, and some were associated with the sewer project under inquiry.

On the substantive issue of the disclosure of Grand Jury minutes, we refer first to the relevant language of the controlling statute (CPL 190.25, subd 4), which declares that Grand Jury proceedings are secret, and mandates that no grand juror or public servant authorized to be present during Grand Jury deliberations (CPL 190.25, subd 3; Penal Law, § 215.70) may, except in the lawful discharge of his duties, or upon written order of the court, disclose the nature or substance of any Grand Jury testimony, evidence, or any decision, result or other matter attending a Grand Jury proceeding.

In this case, we are only concerned with disclosure upon written order of a court. Such an order is strictly discretionary with the Trial Judge. "In ex-

ercising this discretion, the court must balance the competing interests involved, the public interest in disclosure against that in secrecy." (*People v. Di Napoli*, 27 NY2d 229, 234, *supra*.) It is beyond cavil, therefore, that the principle of Grand Jury secrecy is not absolute. On the other hand, the principle supporting disclosure of Grand Jury minutes in aid of enforcement of a public interest is likewise not absolute. Where a public interest has been claimed, disclosure has been permitted (see, e.g., *People v Di Napoli, supra; Matter of Quinn*, 293 NY 787; *People ex rel. Hirschberg v Board of Supervisors*, 251 NY 156; *Matter of Aswad v Hynes*, 80 AD2d 382; *Matter of Scotti*, 53 AD2d 282). Nevertheless, the mere claim of a public interest will not per se guarantee disclosure (see, e.g., *Matter of City of Buffalo*, 57 AD2d 47; cf. *Matter of Carey* [*Fischer*], 68 AD2d 220). The public's access to the minutes of a Grand Jury investigation, even for the sole purpose of protecting the commonweal, will not necessarily warrant disclosure. "No less important is the obligation of the judicial branch of government to protect the reputations of persons accused of crimes but not indicted or convicted, and to protect the court's investigative machinery. The secrecy of the Grand Jury is jealously guarded because the confidentiality of its proceedings must be insured if it is to continue to be effective" (*Matter of Carey* [*Fischer*], 68 AD2d 220, 229, *supra*).

In deciding an application for disclosure of Grand Jury minutes, therefore, a court must weigh the competing interests of Grand Jury secrecy and public access to information for a public purpose. It must determine whether the need to compromise the former is outweighed by the need to satisfy the latter. Nevertheless, it should be emphasized that,

although a balancing test is involved, the plain language of the statute (CPL 190.25, subd 4) establishes that the secrecy of the Grand Jury is to be maintained, unless this secrecy is shown to be unwarranted. In other words, the inviolability of Grand Jury proceedings is presumed, and the burden will be upon the party seeking disclosure to rebut the presumption. Thus, in seeking release of Grand Jury minutes upon a claim that they are necessary for the enforcement of a public interest, it must be shown by sufficient facts that the interest asserted is of such import that it outweighs the dangers inherent in violation of the secrecy of the Grand Jury (*People v Di Napoli,* 27 NY2d 229, 235, *supra*), *and* that the minutes of the Grand Jury proceedings are requisite to a successful effort to protect or vindicate that interest. That is to say, they must be proven to be essential to this effort, though they need not be proven indispensable, (see *People v Di Napoli, supra,* p 238). Consequently, a party seeking disclosure will not satisfy his burden by simply asserting, or even showing, that a public interest is involved. He must, by a factual presentation, demonstrate why, and to what extent, he requires the minutes of a particular Grand Jury to advance the actions or measures taken, or proposed (e.g., legal action, administrative inquiry or legislative investigation), to insure that the public interest has been, or will be, served.

In the case at bar, we hold that the county, in seeking disclosure of the minutes of the February, 1980 Grand Jury III, failed to sustain its burden of showing that these minutes were essential to the prosecution of its Federal civil action under the "RICO" statute. Undoubtedly, the county demonstrated that a public interest was involved in its

efforts to obtain civil damages from those who had allegedly defrauded the county and its residents, stole from the public purse, and cheated the taxpayers. More than this, however, was not shown. It was merely averred, in conclusory fashion, that the Grand Jury minutes were needed, and stated, without specificity, that they would be utilized to commence and maintain the Federal civil action. We are convinced that such a vague, overly broad and factually insufficient showing failed to satisfy the county's burden of rebutting the presumption in favor of Grand Jury secrecy, and, thus, was incapable of presenting the County Court with enough to exercise its discretion in favor of disclosure.

Accordingly, the order should be reversed insofar as appealed from and the motion to vacate the ex parte order authorizing disclosure of the minutes of the February, 1980 Grand Jury III granted.

WEINSTEIN and BRACKEN, JJ., concur in the opinion of MANGANO, J. P. THOMPSON, J. (dissenting). I vote to affirm the order insofar as it is appealed from.

The District Attorney of Suffolk County is seeking to recover more than $262,000,000 in a Federal "RICO" (US Code, tit 18, § 1961 *et seq.*) suit arising from alleged fraud and corruption in connection with the Southwest Sewer District No. 3 (the Project), one of the largest public works projects in the history of Suffolk County. To aid in the prosecution of the suit, the District Attorney requests the release of certain Grand Jury minutes from investigations of the Project. My colleagues would deny the request. I dissent and vote to affirm the order insofar as appealed from.

The majority correctly states that both statute the tradition favor the general secrecy of Grand Jury proceedings and minutes. They correctly state that when disclosure is requested the response to such a request is "strictly discretionary with the Trial Judge." They also reiterate the words of the Court of Appeals that the Trial Judge must "balance" the "competing interests" of "public interest in disclosure" and "secrecy" (see *People v Di Napoli*, 27 NY2d 229). But I do not believe that the majority has correctly analyzed the record in this case because I believe that the District Attorney has shown the overwhelming public interest in disclosure to assist in the attempt at recovering significant sums for the county treasury and has shown the need for the Grand Jury minutes in furthering that public interest.

In *People v Di Napoli* (27 NY2d 229, *supra*), the Public Service Commission was permitted to inspect Grand Jury minutes concerning alleged bid-rigging in public utility contracts. The commission wanted to know whether certain companies had been involved in the bid schemes and whether customers had paid too much because of unwarranted payments. Inspection was permitted, in part because such disclosure was in the interest of protecting consumers from improper utility rates. I believe that the public interest in this case is greater than that shown in *Di Napoli* and that the standards set by the Court of Appeals in *Di Napoli* justify the County Court's decision to permit disclosure.

After reading the record and considering the County Court's decision to permit disclosure with conditions, I am convinced that the court properly exercised its discretion, without any hint of abuse. I see no reason why this court should substitute its

views in a matter "strictly discretionary with the Trial Judge."

I do concur with that portion of the majority's holding on the issue of standing.

MEMORANDUM

COUNTY COURT, SUFFOLK COUNTY

In the Matter of the
Application of the District Attorney of Suffolk County for permission and authorization of the Court for the District Attorney to utilize the minutes of certain Grand Jury proceedings in connection with certain civil proceedings to be brought pursuant to 18 USC 1961 *et seq* State & Federal and Statutory Law.

Index No. 35999/81

BY DOYLE, J.
DATED May 20, 1981

This is a motion to vacate an ex parte order issued on January 27, 1981 which authorized the District Attorney of Suffolk County to utilize the minutes of the February 1980 Grand Jury III in the prosecution of a civil action in a federal district court brought under Title IX of the Organized Crime Control Act of 1970, "Racketeer Influence [sic] and Corrupt Organizations" and commonly known as "RICO" (18 USC § 1961-1968).

The movants herein are several businessmen, construction and engineering firms, and political figures who were examined at several Grand Jury investigations into possible fraud, bribery and political corruption associated with the planning and construction of a sewer project in the southwestern party of Suffolk County. The last one of these in-

quiries, that made by the February 1980 Grand Jury III, had as its purpose an investigation into the circumstances surrounding the payment of cash contributions by contractors to political and elected officials in Suffolk County and resulted in the filing of perjury indictments against Nicholas Barbato, Charles T. Walsh and Regis B. O'Neil, Jr., three of the movants herein. No other charges of a substantial nature have been filed against any other individual.

On January 27, 1981, a proposed *ex parte* order with supporting affidavit annexed was presented to this Court for signature. The affidavit alleged, inter alia, that on the same day, January 27, 1981, the Suffolk County Legislature, in conjunction with the Suffolk County Executive, authorized District Attorney Patrick Henry to act as attorney and counsellor for the County and its agencies, districts and offices in all proceedings and matters relating, directly or indirectly, to the institution of a civil action or actions pursuant to the RICO statute; that the appointment was consistent and compatible with the District Attorneys' common law, statutory and constitutional responsibilities; that the minutes of the February 1980 Grand Jury III were required and necessary for the substantial litigation of the civil action contemplated; and, that a part or all of those minutes would, in any event, be ultimately released in a matter of weeks in connection with the aforementioned perjury prosecutions. The affidavit concludes that "the need to remedy civil wrongs against the municipality and the protection of the public interest dictates authority for utilization of these minutes in a non-criminal proceeding or proceedings arising out of some of the same evidentiary subject matter."

Upon the basis of the aforementioned affidavit and the Court's independent review of relevant law, the order was signed and ordered sealed. The District Attorney, armed with the court order, promptly filed a lawsuit in the United States District Court for the Eastern District of New York. The movants herein countered by bringing a motion to disqualify the District Attorney and his staff from appearing as counsel to the plaintiff therein. It appears from the movant's affidavit that the United States District Court (George C. Pratt, J.) reserved decision on the motion to disqualify Mr. Henry but stayed all proceedings in the civil suit to permit the movants herein to make the instant motion to vacate the *ex parte* disclosure order.

Movants allege as grounds for their motion that (1) the order was improvidently granted, (2) the order was based upon an erroneous presentation of the facts and law, (3) the order was issued in contravention of New York State law, and (4) the order otherwise violates the procedural and substantive due process rights of the movants.

The determination of the question whether disclosure should be permitted is addressed to, and rests in, the sound discretion of the Court (*People v. DiNapoli,* 27 N.Y. 2d 229, 234-235, 316 N.Y.S. 2d 622, 624-626; *Matter of Scotti,* 53 A.D. 2d 282, 286-287, 385 N.Y.S. 2d 659, 662-663; CPL §190.25, subd. (4); Judiciary Law §235) and should be based upon a balancing of "the public interest in disclosure against that in secrecy" (*People v. DiNapoli,* supra, 27 N.Y. 2d p. 234, 316 N.Y.S. 2d p. 625).

While the disclosure of Grand Jury minutes may not be ordered to serve any private interest or to aid a private litigant (*Dworetzky, v. Monticello*

Smoked Fish Co., 256 App. Div. 772, 774, 12 N.Y.S. 2d 270, 273; *People v. Doe*, 47 Misc. 2d 675, 263 N.Y.S. 2d 607) disclosure has been frequently granted to public officers and agencies concerned with the administration of the criminal law or "in furtherance of some official duty to protect an important public interest" (*Matter of City of Buffalo*, 57 A.D. 2d 47, 49, 394 N.Y.S. 2d 919, 921-922, and cases cited therein).

The District Attorney asserts as an initial opposing argument that the movants lack standing to challenge the order sub judice. It is specifically urged that five of the movants never testified before the February 1980 Grand Jury III and that since rights with respect to secrecy are personal to witnesses, these movants may not vicariously assert such rights. (Citing *Penn Ohio Steel Corp. v. Allis Chalmers Co.*, 50 Misc. 2d 860, 876, rev'd on other grds, 28 A.D. 2d 659, aff'd 21 N.Y. 2d 916). He argues the remaining movants also lack standing since (a) they have already received a transcription of their testimony in the said Grand Jury proceeding, (b) they have, by their actions, waived their claim to secrecy by revealing the substance of their testimony in prior public submissions and to their co-movants (citing Wigmore on Evidence [McNaughton ed 1961] §2362-2363 at pp. 735-740); and (c) as indicted perjurers, these movants have no colorable right in connection with a transcription of their, or other witnesses' minutes.

In reply to these arguments, the movants question the precedential value of the Penn Ohio case as it relates to the five unindicted movants. They cite no contrary authority nor has any been found by this Court's own research. They argue instead that the District Attorney's analysis must be re-

jected and Grand Jury secrecy preserved since it is a primary function of the Grand Jury to protect unindicted accuseds from damage to their reputation and public ridicule. This counter-argument begs the issue. Conceding that the need to protect unindicted accuseds militates [sic] in favor of Grand Jury secrecy, that consideration alone will not prohibit disclosure in an appropriate case (see e.g. *Matter of Scotti,* supra, at p. 288, 385 N.Y.S. 2d p. 663). *Matter of Carey,* 68 A.D. 2d 220, 416 N.Y.S. 2d 904, cited by the movants, does not compel a contrary conclusion. In that case, the Appellate Division First Department held, inter alia, that the judicial obligation to protect the reputation of accuseds was a factor to be weighed against the need for disclosure. No adverse comment whatever was made therein concerning Special Term's indication that the need to protect criticized officials would not prevent disclosure (see footnote 5). The Court is persuaded by the view expressed in the Penn Ohio case which holds that the right to challenge an order permitting disclosure of Grand Jury minutes belongs to the witness only (see also Wigmore on Evidence [McNaughton Ed 1961] §2362) and accordingly determines that the movants who did not testify before the February 1980 Grand Jury are without standing to challenge the disclosure order.

The Court cannot, however, concur with a conclusion that Walsh, Barbato and O'Neil lack standing to challenge the order. In contrast to their co-movants, the rights they assert are their own. The argument that they have themselves been furnished transcriptions of their testimony is irrelevant. (*cf Matter of Corporation Counsel of City of Buffalo,* 61 A.D. 2d 3237, 401 N.Y.S. 2d 339, 342). Neither is the Court persuaded by the District

Attorney's argument that the privilege against non-disclosure has been waived by prior disclosures of the movants (citing Wigmore on Evidence [McNaughton Ed 1961] §2362-2363 at pp. 735-740). The use by Wigmore of the term "privilege" does not connote to this Court an analogy to privileges implicated by confidential communications which are deemed to be waived when made in the presence of third persons. The only waiver contemplated by Wigmore is that which is manifested by the witnesses' acquiescence to disclosure. Moreover, to argue that these movants must be denied standing because their minutes do not provide an evidentiary basis for the RICO action is to place the cart before the horse. That these movants may ultimately fail in their efforts to enforce Grand Jury secrecy ought not to relate back to deny them standing to make the application in the first instance.

Numerous allegations and contentions are set forth in movants' affidavit in support of the motion to vacate. For the sake of organization of the determinations herein, the Court will endeavor a consideration of such claims as the Court understands them to relate to the particular grounds alleged hereinabove.

Movants contend the order was improvidently granted (1) ex parte; (2) based upon an affidavit containing conclusory assertions unsupported by factual allegations; (3) which affidavit was deficient for failure to allege there was no other source for the information sought to be utilized; and (4) without a judicial weighing of the competing public policy interests of Grand Jury secrecy and disclosure.

To the movants' complaint that the order was improvidently granted *ex parte,* the Court would

point to Judiciary Law section 325 which authorizes an order of disclosure to be "made after hearing the said district attorney involved" (cf *Application of Scotti,* 53 A.D. 2d 282, 385 N.Y.S. 2d 659). An ex parte application for the disclosure of Grand Jury minutes is not totally devoid of positive attributes inasmuch as it tends to preserve Grand Jury secrecy (In re December 1974 Term Grand Jury Investigation 449 F Supp 743, 747). Moreover, persons aggrieved by an ex parte order are not without a remedy and may properly move to vacate the order (*Application of Scotti,* supra). In any event, the movants, by way of written motion supported by legal memoranda and argument in open court, have been afforded a full opportunity to be heard in opposition to the application for disclosure. The District Attorney, in fact, argues in his opposing memorandum that any alleged but unconceded defects in the original application have been vitiated by the proceeding herein (p. 16). Whether or not this is so remains to be seen.

Movants contend the affidavit insufficiently alleges facts to support conclusory allegations that the Grand Jury transcripts were "required and necessary" and that the authority of the District Attorney to bring the civil suit was "consistent and compatible" with his lawful duties.

The District Attorney alleged in his supporting affidavit that he was appointed to bring and defend civil proceedings and that "In connection thereto and in furtherance of this lawful discharge of official duties, the above Grand Jury transcripts are required and necessary in the interests of justice for the substantive litigation of such civil action or actions. . . Utilization of these minutes is moreover required by such other special counsel,

experts and consultants, consistent with the needs of this lawsuit or lawsuits as required." This Court finds nothing more concerning a showing of need is required pursuant to CPL §190.25, subd. 4 and Judiciary Law §325.

Even if the factual allegations of the District Attorney's affidavit were not in themselves sufficient to support the assertions concerning "consistent and compatible", nothing more was required. He alleged he was authorized by legislative resolution to act as attorney and counsellor for the County in all civil proceedings relating to "Title 18 USC, Section 1961 et seq." Based upon that sworn averment, the Court was justified in finding his posture in the civil action was not merely consistent and compatible with his duties but that it was mandated under County Law §701 which provides, "[H]e shall perform such additional and related duties as may be prescribed by the board of supervisors" (here, the County Legislature). Courts are required, without request, to take judicial notice of the Constitution, the public statutes and the common law of the forum. "Thus it is unnecessary to plead the forum's public law. . . . ." (Prince, Richardson on Evidence, Tenth Edition §17, pp. 11-12).

The movants also contend the District Attorney's affidavit was deficient for failure to allege there was no other source for the material sought to be disclosed (citing *Matter of City of Buffalo,* 57 A.D. 2d 47, 394 N.Y.S. 2d 919; *Matter of Corp. Counsel of City of Buffalo,* 61 A.D. 2d 32, 401 N.Y.S. 2d 339). The District Attorney's answer is that information gleaned from interviews with witnesses made it impossible for him to candidly make such an assertion. The Court does not feel the availability of information from sources other

than the Grand Jury minutes operates as a per se bar to an order of disclosure (see e.g. *People v. DiNapoli*, 27 N.Y. 2d 229, 238). In DiNapoli, the Public Service Commission sought the disclosure of Grand Jury minutes of a concluded proceeding in connection with their investigation into the basis for the fixation of utility rates. In upholding the disclosure order, the Court stated as follows:

> "The circumstance that the Commission might itself be able to gather the essential data and facts contained in the Grand Jury minutes is beside the point. This was a matter to be weighed by the courts below in deciding how to exercise their discretion. They were not required, as a matter of law, to compel the Commission to conduct its own investigation at the expenditure of considerable time and money and make a record of its own rather than avail itself of the existing record resulting from the Grand Jury inquiry."

Movants contend that the District Attorney, in making application for authorization to utilize Grand Jury minutes, mis-stated the facts and incorrectly recited the law upon which the application was based. It is specifically charged the District Atotrney failed to inform the Court that information pertaining to several Grand Jury investigations other than that of the February Grand Jury III had been and would be utilized without prior judicial authorization and that information emanating from all Southwest Sewer District Grand Jury investigations had already been disclosed in consultations with "unauthorized experts" in contravention of law. It is contended such unauthorized uses can readily be inferred

from an examination of the complaint and notices for disclosure that have been filed in the federal action.

The District Attorney avers in his opposing sworn affidavit that notwithstanding the fact evidence in his federal civil action has been drawn from sources other than the subject Grand Jury proceeding, the transcription in question represents the only Grand Jury proceeding utilized thus far (in the preparation of the federal action) and that "under no circumstances was any individual not properly authorized pursuant to CPL §190.25 ever permitted access to the subject Grand Jury minutes." For the purpose of this motion only, the Court is constrained to find the sworn representations of the District Attorney to be more persuasive than the deductive speculations of the movants and credits those assertions herein.

The movants also contend the affidavit upon which the court order was based was factually deficient in that it failed to disclose facts and circumstances pertaining to prior encounters of the movants with various Grand Juries and the results thereof; the transfer of Grand Jury material and information to unauthorized persons by the District Attorney; the maneuverings at legislative proceedings by which the District Attorney was given authorization to institute a civil action against the movants; the restraint placed upon the District Attorney in relation thereto; and, the unauthorized use by the District Attorney of Grand Jury materials for the purpose of the development and prosecution of a civil suit.

The question before this Court is whether its ex parte order authorizing utilization of Grand Jury minutes of the February 1980 Grand Jury III by the District Attorney in civil proceedings was le-

gally authorized and based upon a sufficient affidavit. The allegations made by the movants, which they contend the District Attorney should have disclosed in his application, pose questions concerning (1) possible misconduct on the part of the District Attorney and (2) whether he should be disqualified to act an a civil litigator. As to the former question, the Court finds nothing in the record to suggest improper conduct or lack of good faith on the part of the District Attorney. Any alleged abuse of the Grand Jury process can be dealt with effectively at another time and in another manner. The latter question, as noted hereinabove, is presently under consideration in the pending civil action.

The movants contend the District Attorney's affidavit failed to show a need for release of the minutes prior to the disposition of the perjury charges pending against Walsh, O'Neil and Barbato. What the affidavit did allege was that the Grand Jury minutes would have been released in any event in connection with the perjury prosecutions within a matter of weeks from the date of the application. In granting the application for release, the Court considered the pendency of the criminal charges as academic under the circumstances as represented by the District Attorney in his affidavit.

The proximity in time of any pending criminal trial was specifically disputed by the movants in oral argument on the return date of the instant application. The District Attorney's short answer was that trial of the Barbato case was imminent. Subsequently thereto, on May 4, 1981, more than three months after the order in question was signed, an application by Barbato to the Appellate Division for a change of venue was granted. Thus

it does appear that on that date, at least, no trial of any of the movants was any closer to commencement than it was on January 27, 1981.

Moreoever, contrary to the assertions of Assistant District Attorney Mark Cohen in a letter addressed to this Court dated April 14, 1981, the fact that a federal indictment has been handed up against several of the movants would not render an order vacating the prior order an "idle act". At the very least, it would tend to minimize potential prejudice to the indicted defendants' rights to a fair trial in both the state and federal criminal prosecutions.

While the Court does not now decide that the pendency of criminal prosecution automatically precludes disclosure, (cf *People v. Behan,* 37 MIsc. 2d 911, 235 N.Y.S. 2d 225) it believes release of the minutes ought not to be permitted until after they have been lawfully disclosed at the prospective criminal trial, or after there has been a disposition of the criminal proceedings, or prior thereto in the absence of a strong showing of the necessity for prior disclosure (*Matter of Corp. Counsel of City of Buffalo,* supra, at p. 37). No tenable showing for disclosure at the present stage of these proceedings has been made herein.

Accordingly, the motion to vacate is granted solely to the extent of staying the effectiveness of the Court's prior order until after the transcripts have been properly disclosed at a perjury trial, or the prospective criminal proceedings concluded. Leave is granted herein to the District Attorney to move for disclosure prior to any of the foregoing occurrences in a future application wherein he may show some compelling public interest to be served by earlier disclosure of the Grand Jury minutes.

The Court has reviewed movants' other contentions and finds them to be without merit.

So ordered.

ROBERT W. DOYLE
ROBERT W. DOYLE, J.C.C.

PEOPLE OF THE STATE OF
NEW YORK

-against-

BURTELL CUTLER,

Defendant

CHARLES J. HYNES, ESQ.
Deputy Attorney General
State of New York
N.Y.S. Office Building
Room 4A10
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Hauppauge, N.Y. 11788

Upon this ex parte application, the Special New York State Prosecutor, Deputy Attorney General Charles J. Hynes, seeks an order of this court directing his own Criminal Division to release minutes and exhibits of a Special Grand Jury to his own Civil Recovery Unit. Since such a transfer would be in the lawful discharge of the duties of the Special State Prosecutor, no order of this court is necessary. (CPL 190.25(4)). Therefore, this application is denied.

SO ORDERED.

ENTER
HENDERSON W. MORRISON, J.C.C.

Amicus Brief

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No. 81-1032

In The

Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA,
Petitioner,

v.

SELLS ENGINEERING, INC., ET AL.
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief for General Motors Corporation as Amicus Curiae

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QUESTIONS PRESENTED

1. Whether Federal Rule of Criminal Procedure 6(e)(3)(A)(i) permits disclosure of grand jury material for use in preparing civil litigation.

2. Whether (i) Department of Justice attorneys preparing a civil action, and (ii) other government personnel assisting such attorneys, must demonstrate a "particularized and compelling need" in order to obtain access to grand jury materials.

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In The

Supreme Court of the United States

October Term, 1982

No. 81-1032

UNITED STATES OF AMERICA,
Petitioner,

v.

SELLS ENGINEERING, INC., ET AL.
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief for General Motors Corporation as Amicus Curiae

This brief is being filed on behalf of General Motors Corporation with the consent of all parties.

INTEREST OF THE AMICUS CURIAE

General Motors Corporation ("GM") is the appellee in an appeal pending in the United States Court of Appeals for the Sixth Circuit, *In re April 1977 Grand Jury Proceedings, United States v. General Motors Corporation*, No. 81-1182. In the *General Motors* case the government is seeking a court order allowing use of voluminous grand jury material by the Internal Revenue Service ("IRS") in auditing GM's federal income tax returns. The government admitted in the district court that it had not shown particularized and compelling need for disclosure to the IRS. However, just as in the case at bar, the government argued that it was exempt from the requirement that parties show particularized and compelling need to obtain access to grand jury materials. Instead, the government asserted that the IRS is entitled to obtain any grand jury materials which are "rationally related" to the audit of GM's tax returns. In the present case the government also seeks to establish a "rational relationship" test for disclosure of grand jury materials to government personnel for civil use.

The issues in this case are inextricably intertwined with those presented in *United States v. Baggot*, No. 81-1938, where the government argues that a civil tax investigation is a matter occurring "preliminarily to or in connection with a judicial proceeding" within the meaning of Federal Rule of Criminal Procedure 6(e)(3)(C)(i). Taken together, the positions advanced by the government in *Baggot* and *Sells*, if adopted by this Court, would grant virtually automatic disclosure of grand jury materials to the IRS for use in auditing tax returns at the conclusion of every grand jury in which the IRS is interested.

GM has filed a brief as *amicus curiae* in the *Baggot* case which describes the facts in the *General Motors* case. Those facts illustrate the potential for abuse of the grand jury process which arises when the government expects

to gain ready access to grand jury material for civil or administrative use. Those facts are equally relevant to the present case. Rather than repeat those facts in this brief, GM will restate here the principal characteristics of the grand jury investigation of GM which are pertinent to the issues in the case at bar.

GM had been the subject of an administrative investigation by the IRS, but refused to accede to unreasonable demands made by the IRS agents. The IRS never issued an administrative summons; instead, it asked the Department of Justice to convene an "open-end Grand Jury Investigation." In the letter to the Department of Justice requesting that a grand jury be convened, the IRS stated:

> At the appropriate time we will request that an order be sought from the Court authorizing the disclosure of grand jury information to the IRS under the provisions of Rule 6(e). . . .

Even before the Department of Justice formally agreed to convene a grand jury, the IRS had already assigned 16 IRS agents to be "agents of the grand jury," including the IRS agents who had been conducting the administrative investigation. The IRS also assigned an IRS attorney to question witnesses before the grand jury. This IRS attorney was given a letter by the Department of Justice appointing him a "Special Attorney" to qualify him to appear before the grand jury pursuant to 28 U.S.C. § 515 and Federal Rule of Criminal Procedure 6(d).

The Department of Justice provided two attorneys for the investigation. During the investigation the IRS agents served 168 grand jury subpoenas duces tecum on GM. Over one hundred GM employees were called before the grand jury for questioning by the IRS attorney and two Justice Department attorneys who conducted the proceedings.

In June 1980 the Department of Justice informed GM that the grand jury investigation was at an end. No in-

dictments were returned. Three months later, the government filed a motion for disclosure of voluminous grand jury materials (including transcripts of testimony of 28 present and former GM employees, documents submitted by GM, and memoranda and summaries of grand jury material prepared by the participating government personnel) to the IRS for use in auditing GM's 1972 and 1973 federal income tax returns. The government also requested that the district court permit the IRS agents who had "assisted the grand jury" to participate in the audit.

GM opposed the motion for disclosure, arguing that no pending or impending judicial proceeding existed as required by Rule 6(e)(3)(C)(i), and that the government had failed to show particularized need for the grand jury materials. The district court held that the tax audit of GM was not a matter occurring "preliminarily to or in connection with a judicial proceeding" under Rule 6(e)(3)(C)(i), and denied the government's motion for disclosure without reaching the question of particularized need. *In re April 1977 Grand Jury Proceedings*, 506 F. Supp. 1174 (E.D. Mich. 1981). The government took an appeal to the Sixth Circuit, arguing (1) that the district court's holding construing the "judicial proceeding" requirement should be reversed, and (2) that the Sixth Circuit should order disclosure because the government is exempt from the requirement of showing particularized need for civil use of grand jury materials. The Sixth Circuit has stayed further proceedings pending this Court's decision in *Baggot*.

In the case at bar, the investigation of the respondents was commenced under a set of procedures prescribed at that time by sections 9267.4 and 9268 of the Internal Revenue Manual ("IRM") under the heading "'Open-ended' Grand Jury Proceedings." Those procedures are reprinted in part in the Ninth Circuit's opinion, 642 F.2d at 1186-87, note 2. Similarly, in seeking a grand jury investi-

gation of GM, the IRS had also proposed to use the open-ended grand jury procedures.[1] These procedures stated that the IRS would seek a disclosure order for civil use of the grand jury materials as a matter of course, IRM 9268(2).[2] Even before the grand jury investigation of GM began, the IRS had announced to the Department of Justice that it would request such an order "at the appropriate time," and such an order was indeed sought soon after the Department closed the grand jury investigation.

When the IRS can request a grand jury investigation staffed by IRS agents and with an IRS attorney in the grand jury room questioning witnesses, with the express intent of seeking transfer of the resulting grand jury material to the IRS at the conclusion of the grand jury investigation, the integrity and independence of the grand jury is compromised unless substantial limitations prevent wholesale disclosure of grand jury information for civil purposes. One such limitation is the rule that disclosure for civil use may only be made upon a showing of particularized and compelling need. In the *General Motors* case, District Judge Churchill recognized the importance of this rule for preventing grand jury abuse. His comments on the government's argument that government personnel are entitled to disclosure based upon a lesser showing than everyone else are set forth in the Appendix to GM's *Baggot* brief. In particular, Judge Churchill asserted that strong

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1. In 1977, when the grand jury investigation of GM began, District Judge Churchill ruled that the open-ended grand jury procedures were invalid to the extent that such provisions allowed the IRS to review grand jury materials in order to recommend prosecution to the Department of Justice. See IRM 9267.4(7), quoted in 642 F.2d at 1186, note 2.

2. Presently, section 9267.5 of the Internal Revenue Manual provides that the IRS will seek a Rule 6(e) order as a matter of course "when the tax consequences warrant."

justification exists, if a "double standard" is to be applied, to put "a heavier burden on the government" than on other applicants for disclosure. He noted that the government, unlike other applicants, institutes and controls the grand jury's activities, and is therefore in a position to use the grand jury to collect information for purposes other than determining probable cause to indict.

Judge Churchill's comments aptly summarize the reasons why the government should not enjoy the benefit of a lesser standard of need in gaining access to grand jury materials for civil and administrative uses. Having been subjected to a lengthy grand jury investigation instigated by the IRS, GM urges this Court to maintain the independence of the grand jury as a criminal enforcement tool, and to prevent encroachment upon the grand jury process by the Executive Branch, by affirming the decision of the Ninth Circuit.

SUMMARY OF ARGUMENT

Rule 6 of the Federal Rules of Criminal Procedure allows "attorneys for the government" to be present in the grand jury room and to scrutinize grand jury material. These provisions enable an attorney for the government to perform his duty of assisting the grand jury and prosecuting any indictments returned by the grand jury. These provisions do not authorize attorneys for the government to enter the grand jury room or scrutinize grand jury materials in performing other duties such as engaging in civil litigation.

Disclosure of grand jury material to anyone for civil use is governed by Rule 6(e)(3)(C)(i), authorizing disclosure "preliminarily to or in connection with a judicial proceeding." Such disclosure is authorized only upon a showing of particularized and compelling necessity. The vast majority of lower courts have sensibly required gov-

ernment agencies and officials as well as private parties to meet this high standard. Allowing disclosure to government personnel without a showing of particularized need in a civil case would encourage government personnel to expand grand jury activity beyond its duty to determine probable cause to indict.

Although the government in this case argues for an exemption from the particularized need requirement when the applicant is an attorney in the Department of Justice and assisting personnel, a ruling in favor of the government would facilitate the funneling of grand jury information to administrative agencies such as the Internal Revenue Service, which has long sought unsuccessfully to gain ready access to grand jury materials for use in tax audits. In particular, a ruling favorable to the government would be presented to the Sixth and Ninth Circuits, where the government has argued in pending cases that the IRS itself should be exempt from showing particularized need. Furthermore, the government's purported limitation of the exemption to Department of Justice attorneys does not exclude administrative agencies because the government has both the power and the propensity to appoint agency attorneys as "Special Attorneys" of the Justice Department, eligible to conduct grand jury proceedings.

ARGUMENT

I. RULE 6 DOES NOT AUTHORIZE ATTORNEYS IN THE DEPARTMENT OF JUSTICE TO USE GRAND JURY MATERIAL FOR ANY PURPOSE THEY CHOOSE.

The government asserts that, because Rule 6(e) does not explicitly limit the purposes for which an "attorney for the government" may use grand jury materials "in the performance of such attorney's duty," the government attorney may therefore use grand jury material for any

purpose. This position contradicts the obvious purpose of the drafters of Rule 6 when it was promulgated in 1946.

The 1946 Advisory Committee Note to Rule 6 states that "government attorneys are entitled to disclosure of grand jury proceedings . . . inasmuch as they may be present in the grand jury room during the presentation of evidence." The drafters obviously saw a need to state an exception to the rule of secrecy to permit disclosure of grand jury material to those Government attorneys whose duties may require them to be present in the grand jury room.

Rule 6(d) specifies who may be present in the grand jury room, and authorizes "[a]ttorneys for the government" to be present while the grand jury is in session. If the government's argument were applied to Rule 6(d), which, like Rule 6(e)(3)(A)(i), contains no express limitation of purpose, then Rule 6(d) would allow an "attorney for the government" assigned to the Civil Division to be present in the grand jury room in order to prepare his civil case.[8]

The drafters of Rule 6 saw no need to state an express limitation of purposes in either Rule 6(d) or Rule 6(e). The drafters reasonably assumed that "attorneys for the government" who were present in the grand jury room and who had access to the grand jury materials would be performing their duty of assisting the grand jury in its criminal investigation.

If this Court adopted the government's position that "attorneys for the government" may have access to grand jury materials for any purpose, the power to supervise

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[8] The government admits that its reading of Rule 6(e) is "not congruent" with Rule 6(d), which concededly does not allow "attorneys for the government" to be present in the grand jury room unless their presence is necessary to assist the grand jury. Brief for the United States, page 24, note 19.

disclosure of grand jury materials and to protect grand jury secrecy would be transferred from the federal courts to the Executive Branch. The Attorney General has claimed statutory authority to appoint private lawyers and attorneys employed by government agencies to be "Special Attorneys" authorized to conduct grand jury proceedings. 28 U.S.C. §§ 515, 543. In the grand jury investigation of GM, an IRS attorney was appointed a "Special Attorney" authorized to conduct grand jury proceedings. *In re April 1977 Grand Jury Subpoenas, General Motors Corporation v. United States*, 573 F.2d 936, 941 (6th Cir.), *vacated on other grounds*, 584 F.2d 1366 (6th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 934. This IRS attorney used such authority to question witnesses before the grand jury. In the government's view, this IRS attorney could have used the grand jury materials for any purpose, criminal or civil.

In *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979), *appeal dismissed*, No. 79-1944 (7th Cir. September 29, 1979), the Environmental Protection Agency ("EPA") caused its own staff attorney to be appointed a "Special Attorney" in order to conduct a grand jury investigation of a chemical company. Simultaneously, this EPA attorney was participating in an EPA administrative proceeding against the same chemical company. The EPA attorney used grand jury information in his role as staff attorney in the EPA administrative proceeding. The district court dismissed the criminal indictment against the chemical company and its officers because of the EPA attorney's misconduct. This case illustrates the willingness of the Department of Justice to appoint agency attorneys to serve as "attorneys for the government" to conduct grand jury proceedings while furthering civil law goals. The existence and frequent use of this government practice demonstrates the wisdom of construing the phrase "for use in the performance of such attorney's duty" to encompass only the attorney's duty to conduct the grand jury and any

criminal proceedings which the grand jury commences by indictment.

The federal courts must retain the control they have always exercised over the civil use of grand jury materials. Government agencies which need grand jury materials should apply to the courts pursuant to Rule 6(e)(3)(C)(i), rather than seek a letter appointment from the Justice Department pursuant to 28 U.S.C. § 515. The interpretation proposed here would leave the Department of Justice free to appoint "Special Attorneys" in appropriate circumstances, but without endangering the integrity of the grand jury as an independent institution of criminal justice.

II. DISCLOSURE OF GRAND JURY MATERIAL TO GOVERNMENT PERSONNEL FOR CIVIL OR ADMINISTRATIVE USE SHOULD BE PERMITTED ONLY UPON A SHOWING OF PARTICULARIZED NEED.

Disclosure of grand jury materials to government personnel for civil enforcement purposes requires court approval pursuant to Rule 6(e)(3)(C)(i). The party seeking disclosure must satisfy the "judicial proceeding" requirement stated in the Rule, and must also demonstrate particularized need for the grand jury materials. This latter requirement was established by landmark decisions of this Court. *United States v. Procter & Gamble Co.*, 356 U.S. 677; *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395; *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211. It has been applied in scores of cases by other federal courts to ensure that disclosure will indeed be an exception to the general rule of secrecy, as Rule 6(e)(2) states, rather than a routine occurrence once the judicial proceeding requirement is satisfied.

The Government argues that it alone should not be required to demonstrate particularized need because of its

"law enforcement" responsibilities. The government seeks the benefit of a double standard: it would need to show only a "rational connection" between the grand jury material and the use to which it would be put, while every other applicant for a Rule 6(e) disclosure order would have to show particularized and compelling necessity for the materials to avoid an "injustice in another judicial proceeding," as required by *Procter & Gamble* and *Douglas Oil*. The standard which the government seeks is virtually no standard at all. Because it is a test of possible relevance, not a standard of need, it will be satisfied in virtually every Rule 6(e) proceeding.

The government's brief ignores the overwhelming case law contrary to its position. Almost every reported decision ruling on the showing required for disclosure to government personnel for civil or administrative use has, like the Ninth Circuit in the present case, held that (i) the standard of disclosure contained in *Procter & Gamble* and *Douglas Oil* is applicable to government agencies, and (ii) government agencies must show particularized need and compelling necessity to obtain grand jury materials. *In The Matter of Grand Jury Proceedings, Miller Brewing Company*, 687 F.2d 1079 (7th Cir. 1982); *In re Application of the United States for an Order Pursuant to the Provisions of Rule 6(e), Federal Rules of Criminal Procedure*, 505 F.Supp. 25 (W.D. Pa. 1980) (relevance to an IRS audit is not compelling necessity); *SEC v. Everest Management Corp.*, 87 F.R.D. 100 (S.D.N.Y. 1980) (disclosure to SEC in order to expedite civil enforcement proceedings is not compelling necessity); *In re Grand Jury Investigation of Uranium Industry*, 1979-2 Trade Cases [CCH] ¶ 62,798 (D.D.C. 1979) (Senate Judiciary Committee must show compelling necessity to obtain grand jury transcripts); *In re Grand Jury Matter*, 495 F.Supp. 127, 133 (E.D. Pa. 1980) (showing of particularized need by Mine Safety and Health Review Commission appeared to be insufficient);

In re Proceedings Before the Federal Grand Jury for the District of Nevada, 487 F.Supp. 1098 (D.Nev. 1980) (government must demonstrate particularized need); *United States v. Young*, 494 F.Supp. 57 (E.D. Tex. 1980) (same); *In Re Grand Jury, Sept. 20, 21, 22 and 25, 1967*, 82 F.R.D. 70 (N.D. W. Va. 1979) (Civil Division of Department of Justice must show particularized need for disclosure of grand jury material); *In re Grand Jury Impanelled October 2, 1978* (79-2), 510 F. Supp. 112, 114 (D.D.C. 1981) (particularized need test in *Douglas Oil* is applicable to disclosure motion by Senate Committee); *Cohen v. Commissioner*, 42 Tax Ct. Mem. Dec. [CCH] 312, 318-19 (1981) (particularized need test in *Douglas Oil* is applicable to disclosure motion by IRS). See *In re April 1977 Grand Jury Proceedings*, 506 F. Supp. 1174, 1177 (E.D. Mich. 1981) (IRS must show particularized need for grand jury records).

The Seventh Circuit's recent decision in *Miller Brewing* denied IRS access to grand jury transcripts for civil enforcement purposes because the government failed to demonstrate particularized need. The government conceded (687 F.2d at 1093) that it had not shown particularized need, but argued that the rational relationship test should be applied to government requests only, and that under this test the IRS should have received access to the grand jury transcripts. After summarizing the authorities, the Seventh Circuit rejected the Government's plea for special treatment, stating (687 F.2d at 1091-92):

> A showing of rational relationship between the materials and the civil proceeding may explain the government's desire for disclosure, but does not determine the degree of necessity. *Sells*, 642 F.2d at 1192. We prefer a standard which requires all parties to establish particularized need and which affords governmental agencies no special treatment. *Procter & Gamble*, 356 U.S. at 685 (Whittaker, J., concurring) . . . Although the fact that the party seeking disclosure

> is a federal agency may weigh heavily in the district court's exercise of discretion, the application of the particularized need requirement to all requesting parties is a safeguard for the grand jury because it tends to prevent it from being used as an instrument for explorations in aid of civil proceedings. *In re April 1956 Term Grand Jury*, 239 F.2d at 271-72.

Moreover, the Government has cited only two cases (Brief for the United States, p. 42) in support of its rational relationship standard. In both decisions, *In re Grand Jury (LTV)*, 583 F.2d 128 (5th Cir. 1978), and *In re Grand Jury Subpoenas, April, 1978, at Baltimore*, 581 F.2d 1103 (4th Cir. 1978), cert. denied *sub nom. Fairchild Industries, Inc. v. Harvey*, 440 U.S. 971, the language favorable to the rational relationship test was *dictum*. The Fourth Circuit case did not even involve a request for disclosure under Rule 6(e)(3)(C)(i).[4]

III. THE POLICIES REQUIRING GRAND JURY SECRECY ARE APPLICABLE TO THE GOVERNMENT.

In addition to the five reasons why grand jury proceedings must be secret stated in *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954), and cited by this Court in *Procter & Gamble*, 356 U.S. at 681 n.6, when the applicant for disclosure is the government or a federal agency, the courts have stated a sixth reason for grand jury secrecy and a particularized need test – to prevent grand jury abuse. The rule of grand jury secrecy discourages attempts by government officials and agencies to utilize grand juries for purposes other than determining whether probable cause exists to indict. The routine avail-

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[4] The Fourth Circuit's decision quotes from a district court decision, *In re December 1974 Term Grand Jury*, 449 F. Supp. 743 (D. Md. 1978), which favors the government's position. However, that case was heard *ex parte*, with only the government present to argue its position.

ability of grand jury material to government agencies and officials, based only upon a showing of relevance ("rational relationship") to some civil or administrative matter, would create a tremendous incentive for government agencies and officials to refer the slightest inferences of criminal conduct to grand juries for investigation. The courts have therefore held that the traditional rule of grand jury secrecy is essential to prevent possible abuse of the grand jury process by government officials and agencies; *In re Grand Jury Investigation No. 78-184 (Sells), supra,* 642 F.2d at 1190; *In the Matter of Grand Jury Proceeding, Miller Brewing Company,* 687 F.2d 1079, 1092 (7th Cir. 1982); *In re Special February, 1975 Grand Jury (Baggot), supra,* 662 F.2d at 1237; *United States v. Universal Manufacturing Company,* 525 F.2d 808, 811-12 (8th Cir. 1975); *In re April 1977 Grand Jury Proceedings, supra,* 506 F. Supp. at 1181-82; *In re Application of the United States for an Order Pursuant to the Provisions of Rule 6(e), Federal Rules of Criminal Procedure,* 505 F. Supp. 25, 27 (W.D. Pa. 1980); *In re Grand Jury Investigation,* 414 F. Supp. 74, 76 (S.D.N.Y. 1976); *Capitol Indemnity Corporation v. First Minnesota Construction Company,* 405 F. Supp. 929, 932-34 (D. Mass. 1975). See also *Note, Administrative Agency Access to Grand Jury Material under Amended Rule 6(e),* 29 Case W.R.L. Rev. 295, 320 (1978); *Note, Administrative Agency Access to Grand Jury Materials,* 75 Colum. L. Rev. 162, 166-67 (1975). These authorities reflect the concern expressed by Mr. Justice Whittaker, concurring in *United States v. Procter & Gamble Company,* 356 U.S. 677, 685, that the rule of grand jury secrecy be interpreted "to eliminate the temptation to conduct grand jury investigations as a means of *ex parte* procurement of direct or derivative evidence for use in a contemplated civil suit." Judge Churchill aptly addressed this concern in his oral opinion in the

General Motors case, quoted in the Appendix to GM's *Baggot* brief.

Because grand jury proceedings are secret and because government investigative files are non-discoverable, grand jury proceedings cannot as a practical matter be challenged or regulated. Courts carefully protect grand juries from scrutiny by private parties to determine the propriety or soundness of their work. *United States v. Calandra*, 414 U.S. 338, 343-46. In order to protect the grand jury's integrity as an instrument of criminal law enforcement, while allowing the grand jury to conduct its work unfettered by restrictions and judicial review, courts have rightly subjected disclosure requests of government agencies and officials to the same rigorous standard of particularized need that other applicants for Rule 6(e) orders have been required to meet.

IV. THE GOVERNMENT SHOULD BE REQUIRED TO SHOW PARTICULARIZED NEED FOR DISCLOSURE TO ADMINISTRATIVE AGENCY PERSONNEL.

The government's brief limits its argument for disclosure upon a mere showing of "rational relationship" to cases where an attorney in the Civil Division of the Department of Justice, and supporting personnel aiding the attorney, are preparing a civil case for trial. Nevertheless, in cases involving motions for disclosure to administrative agencies, the government has argued for the same double standard which would permit disclosure to government agencies based only upon a showing of relevance, *e.g.*, *In the Matter of Grand Jury Proceeding, Miller Brewing Company, supra*, 687 F.2d at 1090-93. Indeed, the Ninth Circuit has withdrawn from submission a second appeal in the case at bar ("Sells II") pending this Court's decision; that appeal concerns an order granting disclosure of

grand jury materials to the Internal Revenue Service. Brief of the United States at 8-9, note 8. One of the two issues argued by the government in the *General Motors* case to the Sixth Circuit (which has stayed disposition pending this Court's decision in *Baggot*) is whether *the IRS* is entitled to disclosure based solely upon a showing of relevance to the determination of tax liability.

The *Sells II, Miller Brewing* and *General Motors* cases are the culmination of the efforts of the IRS, beginning prior to 1974, to establish a mechanism through which grand jury information will be made available for tax administration purposes as a matter of course. These efforts can be divided historically into three phases; the circumvention phase, the legislation phase, and the reinterpretation phase.

Prior to 1974 the IRS commenced its efforts to weaken grand jury secrecy by promulgating in § 9267 of the Internal Revenue Manual the "reluctant witness procedure" described in *In re Grand Jury Subpoena (Berkovitz)*, 367 F. Supp. 1058, 1060-61 (E.D. Pa. 1973), and the "Open-ended Grand Jury" procedure described in the opinion below, 642 F.2d at 1186 note 2. These procedures were intended to allow the IRS to seek issuance of grand jury subpoenas for its own purposes, control the grand jury investigation, and gain possession of the fruits of the grand jury's inquiry. In the *General Motors* case the Department of Justice granted the request of the IRS for an "Open-ended Grand Jury" proceeding. However, these procedures were partially abandoned after criticism from the courts, as noted by the court below, 642 F.2d at 1186-87 note 2.

The IRS then sought legislation to achieve its goals. Although the IRS succeeded in obtaining, through the 1977 amendments to Rule 6(e), limited authorization for IRS agents to scrutinize grand jury materials without

application to the courts, Congress specifically limited the purpose of such scrutiny to assisting the prosecutors in enforcing "federal criminal law." Rule 6(e)(3)(A)(ii).

Finally, the IRS began to seek judicial reinterpretation of Rule 6(e) to allow the IRS routine access to grand jury materials, through relaxation of the requirement that disclosure occur for use in a pending or impending judicial proceeding, and relaxation of the standard of particularized need. After a single initial success gained by arguing its position on an *ex parte* basis, *In re December 1974 Term Grand Jury Proceedings*, 449 F. Supp. 743 (D. Md. 1978), the IRS has almost always failed to persuade the courts to relax the established rules of grand jury secrecy for its benefit. *E.g., Miller Brewing Company, supra*, 687 F.2d at 1090-93, *General Motors, supra*, 506 F. Supp. at 1181-82; *Baggot, supra*, 662 F.2d at 1237; *In re 1978-1980 Grand Jury Proceedings*, 503 F. Supp. 47 (N.D. Ohio 1980). This series of failures was broken by only one other success — when the government again appeared *ex parte* to argue its position, *In re Judge Elmo B. Hunter's Special Grand Jury*, 667 F.2d 724 (8th Cir. 1981).

By obtaining certiorari in this and the *Baggot* case, the government has created its first opportunity to seek from this Court the reinterpretation of the rules of grand jury secrecy which the IRS wants. Both the court below and the Seventh Circuit in *Baggot* (and subsequently in *Miller Brewing*) have reaffirmed the importance of grand jury secrecy when disclosure is sought by the government for civil purposes, while continuing to recognize that civil use is proper upon a showing of particularized need. GM urges this Court to affirm both decisions below and to put an end to the efforts of the IRS to gain routine access to grand jury materials for civil administrative purposes.

CONCLUSION

Grand juries exist to find the perpetrators of crime and to shield the innocent from unjust accusations. This venerable institution, preserved by the Constitution, should not be converted into a clearinghouse of information for government agencies and officials. Government agencies and officials should be required to make the same showing of compelling necessity as everyone else who seeks to scrutinize information collected by the grand jury. The decision of the court below properly protected the integrity and independence of the grand jury, and should be affirmed.

Respectfully submitted,

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November 1982

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Office - Supreme Court
FILED
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ALEXANDER L. STEVAS
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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1032

UNITED STATES OF AMERICA, PETITIONER

v.

SELLS ENGINEERING, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE MILLER BREWING COMPANY AS *AMICUS CURIAE* URGING AFFIRMANCE

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INTRODUCTION

The Miller Brewing Company ("Miller"), respectfully submits this brief as *amicus curiae* urging affirmance of the decision of the Court of Appeals. All parties to this case have consented in writing to Miller's participation as an *amicus curiae*. Copies of the correspondence giving consent are attached as Appendices A, B, and C.

INTEREST OF THE *AMICUS CURIAE*

From mid-1979 through mid-1980, Miller was the target of an extensive grand jury investigation of its tax affairs. The grand jury was eventually terminated by the government without any charges of any kind being brought against Miller, any officer or employee of Miller, or anyone else. However, shortly after terminating the grand jury, the government filed a petition under Fed. R. Crim. Proc. 6(e) seeking to allow civil tax

investigators from the Internal Revenue Service access to the fruits of the grand jury investigation.[1]

Miller is opposing the government's Rule 6(e) petition. The litigation has given rise to two decisions by the United States District Court for the Eastern District of Wisconsin, reported at 510 F. Supp. 585 (1981) and 518 F. Supp. 163 (1981). The latter decision was appealed to the United States Court of Appeals for the Seventh Circuit by all parties involved. (Seventh Circuit Case Nos. 81-2077, 81-2115, and 81-2407.) The three cases were consolidated and decided by the Seventh Circuit on September 3, 1982.[2] Both Miller and the government filed petitions for rehearing. The Seventh Circuit is withholding decision on both petitions pending this Court's decision in the case at bar.[3]

Miller's litigation with the government presents one question identical to a question presented by the Solicitor General's brief in the present case, *i.e.*, whether government attorneys and technical support personnel seeking access to grand jury materials pursuant to Rule 6(e)(3)(C)(i) must demonstrate a "compelling and particularized need." (Gov't Br., p. (I)) The Seventh Circuit agreed with Miller that the government must show particularized need. (Slip Op. 18) The Court's decision in this case will control resolution of that question in any further litigation of Miller's case.

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[1]The government's petition seeks grand jury documents and the testimony especially selected by the IRS agent assigned to assist the grand jury as relevant to building a civil tax case against Miller.

[2]*In the Matter of Grand Jury Proceedings, Miller Brewing Company*, Nos. 81-2077, 81-2115 and 81-2407, Slip Op. (7th Cir. Sept. 3, 1982). The Seventh Circuit affirmed in part and reversed in part the District Court's decision.

[3]*In the Matter of Grand Jury Proceedings, Miller Brewing Company*, Nos. 81-2077, 81-2115 and 81-2407 (7th Cir. Oct. 27, 1982)(Order holding decision or petitions for rehearing).

Miller also has an interest in the first question presented by the Solicitor General, *i.e.*, whether Civil Division attorneys with the Department of Justice are entitled to examine grand jury materials without judicial authorization. The effect of Miller's success in the Seventh Circuit could easily be circumvented by the government if this Court agrees with the Solicitor General that Civil Division attorneys are entitled to grand jury materials without a court order. The government could simply transfer Miller's tax case from the IRS attorneys who are now handling it to Civil Division attorneys.

For the foregoing reasons, Miller has an interest in the resolution of the issues presented in this case, and respectfully submits this brief as an *amicus curiae*.

SUMMARY OF ARGUMENT

Rule 6(e) establishes a general rule of grand jury secrecy. Disclosure of grand jury material may only be made pursuant to a specific exception to the rule. Rule 6(e)(3)(A)(i) is not a blanket exception allowing Civil Division attorneys to have absolute and unrestricted access to grand jury materials. There is no support for such an interpretation in the legislative history of Rule 6(e). In addition, such an interpretation is unreasonable and is an invitation to grand jury abuse.

Civil Division attorneys and technical personnel may obtain access to grand jury materials through a court order under Rule 6(e)(3)(C)(i). However, they must be able to demonstrate a particularized and compelling need for the materials sought in order to obtain such an order. The mere showing of a rational relationship to a civil case, or of cost saving and convenience does not meet this test.

ARGUMENT

I. JUSTICE DEPARTMENT ATTORNEYS HANDLING CIVIL MATTERS ARE NOT ENTITLED TO ABSOLUTE AND UNRESTRICTED ACCESS TO GRAND JURY MATERIALS WITHOUT JUDICIAL AUTHORIZATION.

Rule 6(e)(3)(A) provides:

> Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to —
>
> (i) an attorney for the government for use in the performance of such attorney's duty.
>
> * * * *

The Solicitor General contends that the language of Rule 6(e)(3)(A)(i) should be interpreted to allow Justice Department attorneys[4] handling civil matters complete and unrestricted access to any grand jury material they would like to inspect. This argument was rejected by the Ninth Circuit below, and was rejected by the Seventh Circuit in *In re April 1956 Grand Jury*, 239 F.2d 263 (7th Cir. 1956).[5] The legislative history of Rule 6(e), the rule of reasonable interpretation, and public policy

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[4]The phrase "attorney for the government" is defined by Rule 54(c) to mean attorneys employed by the Justice Department. It does not include attorneys employed by other government agencies.

[5]The Fifth Circuit has held that Civil Division attorneys may inspect grand jury materials without prior judicial authorization. *In re Grand Jury (LTV)*, 583 F.2d 128 (5th Cir. 1978).

considerations all require that the Solicitor General's argument be rejected and that all government attorneys be required to obtain a court order before obtaining access to grand jury materials for use in civil cases.

A. The Legislative History Of Rule 6(e) Does Not Indicate That The "Attorneys For The Government" Exception Was Intended To Allow Justice Department Attorneys Handling Civil Matters An Absolute And Unrestricted Right Of Access To Grand Jury Materials.

The Solicitor General argues that the history of Rule 6(e) does not indicate an intent to limit disclosure to attorneys engaged in criminal prosecution duties. This argument turns Rule 6(e) on its head, and misstates the question presented by this appeal. Rule 6(e)(2) sets forth a general rule of grand jury secrecy, prohibiting any specified person, *including an attorney for the government*, from disclosing matters occurring before the grand jury. Rule 6(e)(3) then sets forth the only exceptions to the general rule. The question involved here is whether Rule 6(e)(3)(A)(i) is intended to except government civil attorneys from the general rule prohibiting disclosure, not whether it is itself intended as a prohibition of such disclosure. The legislative history of Rule 6(e) should be examined to determine if the drafters intended that the "attorneys for the government" exception be interpreted to allow government attorneys access to grand jury materials for use in purely civil work. There is no evidence that they did.

Rule 6(e) first became effective in 1946. At that time the rule provided:

> (e) **Secrecy of Proceedings and Disclosure.** Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a

> juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding. . .

The primary concerns of the drafters of Rule 6(e) were (1) to protect the secrecy of grand jury materials by codifying the common law rule of secrecy, and (2) to deal with the question of a criminal defendant's right of access to matters occurring before the grand jury which indicted him. *See* Orfield, *The Federal Grand Jury*, 22 F.R.D. 343 (1958). The 1946 Advisory Committee's Notes explain that the rationale for the attorneys for the government exception was that these attorneys " . . . may be present in the grand jury room during the presentation of evidence." This rationale does not indicate any intention to authorize disclosure to attorneys who do civil work (who would not be present in the grand jury room).

There is no indication in the 1946 Advisory Committee's Notes that the Committee even considered the question of access to grand jury materials by government attorneys doing civil work, much less that they intended to authorize disclosure to them. The Solicitor General admits that "the Advisory Committee simply had no occasion to comment upon the disclosure of grand jury materials to government attorneys responsible solely for the civil aspect of the matter investigated by the grand jury." (Gov't Br., pp. 24-25) Instead, the Solicitor General asserts only that the Notes fail to show that the Committee intended to prohibit such disclosure. This is not the question, however. Under Rule 6(e) any disclosure is barred, unless explicitly permitted by an exception. There is no evidence that in 1946 the Committee drafted the "attorneys for the government" exception intending it to extend to attorneys doing purely civil work.

The Solicitor General also argues that the general practice of the Justice Department in 1946 was to allow civil attorneys

access to grand jury materials. If that was the general practice of the Justice Department in 1946, there is no indication that the practice was known to or approved by either the Advisory Committee in drafting the Rules or by this Court in adopting them. Indeed, in what appears to be the only time that the issue has been addressed by a member of this Court, disclosure of grand jury material to government attorneys in a civil case without a court order was explicitly disapproved. *United States v. Procter & Gamble*, 356 U.S. 677, 684-685 (1958) (Whittaker, J., concurring.)

Surprisingly, the Solicitor General cites *Procter & Gamble* as authority for his position. In *Procter & Gamble*, the defendant corporations in a civil antitrust case brought by the government sought access to grand jury materials. Apparently, the government attorneys handling the case simply took possession of the grand jury material without seeking a court order. As the Solicitor General admits, access to the grand jury materials by the government attorneys was not an issue in the case, and nowhere in its opinion does the majority ever address the question of the propriety under Rule 6(e) of the government attorneys' action. (Gov't Br., p. 19) However, the Solicitor General argues that because one of the several defendants asserted in its brief that the government's action violated Rule 6(e), the majority's silence on the question should be interpreted as a rejection of the argument. This is a convoluted interpretation of the majority opinion.

In fact, the guidance on these questions offered by the *Procter & Gamble* case is found in Justice Whittaker's concurring opinion. Unlike the majority, Justice Whittaker does address the question of the propriety of the government attorneys' action in taking possession of the grand jury material for civil use.

> The grand jury minutes and transcripts are not the property of the Government's attorneys, agents or investigators, nor are they entitled to possession of them

> in such a case. Instead those documents are records of the court. And it seems clear that where, as here, a 'no true bill' has been voted, their secrecy, which the law wisely provides, may be as fully violated by disclosure to and use by the government counsel, agents and investigators as by the defendants' counsel in such a civil suit. *Procter & Gamble, supra*, at 684-685.

Justice Whittaker does not indicate that he believed that the majority addressed this question, or disagreed with his views.

Justice Whittaker outlined a procedure to be followed at the termination of a grand jury proceeding. Under this procedure, grand jury materials would be subject to inspection by *any* party in a civil suit *only after a court order*.

The Solicitor General also asserts (Gov't Br., pp. 34, 44) that the *Procter & Gamble* case establishes that a government attorney who becomes privy to grand jury material while assisting a grand jury may employ those materials for civil litigation purposes without a court order. Therefore the Solicitor General does not even address the question of whether a government attorney who has worked with a grand jury may subsequently use the grand jury's materials for civil purposes. This bald assertion is simply not supported by the *Procter & Gamble* majority opinion. Obviously it is not possible for such an attorney to "erase" the knowledge he has acquired from his participation with the grand jury. But this certainly does not compel the conclusion that he is then entitled to absolute and unrestricted access to grand jury transcripts and documents. *All* government attorneys are required to obtain a court order before using grand jury materials for civil purposes.

In 1976, this Court proposed an amendment to Rule 6(e) designed to facilitate the use of technical experts to assist attorneys working with grand juries by allowing disclosure to such

experts without a court order. The proposed amendment accomplished this by defining attorneys for the government to include "such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties." S. Rep. No. 95-354, 95th Cong., 1st Sess. 8 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 527, 529. Congress agreed that access to grand jury materials by technical experts assisting government attorneys in criminal matters should be made easier, and changed the language used to do this by creating present Sections (3)(A)(ii), and 3(B), allowing disclosure to government personnel deemed necessary to assist attorneys in enforcing federal criminal law.

The congressional report explaining these changes reveals that when Congress considered the amendment it focused only on the question of disclosure to technical experts. The earlier "attorneys for the government" exception was not changed, and there is no evidence that by facilitating access by technical experts involved in criminal law enforcement Congress also intended to allow unrestricted access to grand jury materials by government attorneys doing civil work. In fact, the Senate Report states that the amendment was not intended to make any change in the practice regarding disclosure of grand jury materials for civil purposes existing under prevailing court decisions which did not allow government attorneys doing civil work absolute and unrestricted access to grand jury materials.[6]

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[6]The two cases noted as "prevailing decisions" in a footnote to the Senate Report are *United States v. Procter & Gamble, supra*, and *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098 (E.D. Pa. 1976). As noted above, the only discussion in *Procter & Gamble* of disclosure to government attorneys for civil use is found in Justice Whittaker's concurring opinion criticizing any such practice without a court order. The *Hawthorne* case does not address the question at all. The only Court of Appeals holding on the question which existed when the Senate Report was written was *In re April 1956 Grand Jury*, 239 F.2d 263 (7th Cir. 1956) (government attorneys doing civil work may *not* inspect grand jury materials without judicial authorization.)

The Solicitor General's brief goes to great lengths to demonstrate that the 1977 amendment was not intended to restrict access to grand jury materials by government attorneys handling civil matters. Once again, this argument begs the question. The question is does the 1977 amendment explicitly create an exception to the general rule of secrecy for government attorneys engaged in purely civil work. It does not.

B. The Interpretation Of Rule 6(e) Urged By The Solicitor General Is Unreasonable.

As the above analysis demonstrates, the legislative history of Rule 6(e) does not support the Solicitor General's position that the "attorneys for the government" exception was intended to allow government civil attorneys absolute and unrestricted access to grand jury materials. From the government's point of view, the legislative history is at best inconclusive. In such a case a statute or rule must be interpreted in light of common sense. *Rosado v. Wyman*, 397 U.S. 397, 412 (1970). Here, common sense compels rejection of the Solicitor General's interpretation of Rule 6(e) for several reasons.

First, the Solicitor General's interpretation draws a distinction between Justice Department attorneys doing civil work and other government attorneys. There is no reason for making such a distinction. Under the Solicitor General's interpretation if, for example, a civil tax fraud case is assigned to a Justice Department attorney, that attorney has free reign to inspect any grand jury materials without obtaining a court order. However, if the same case were assigned to an attorney for the Internal Revenue Service, that attorney could not use grand jury materials without first obtaining a court order under Rule 6(e)(3)(C)(i). There is no logical reason for such a distinction, and Rule 6(e)(3)(A)(i) should not be interpreted to assume Congress intended such an illogical distinction.

Second, the distinction urged by the Solicitor General is meaningless, because it could be easily circumvented. The litigation in which Miller is presently engaged is a good example. If the litigation concludes with a determination that the Internal Revenue Service attorneys presently seeking the grand jury materials are not entitled to a court order authorizing such disclosure, what is to prevent the IRS from transferring the case to a Justice Department attorney, or even "reassigning" the IRS attorney handling the case to the Justice Department for the purposes of the lawsuit?[7] That attorney could then simply take the grand jury materials for his use without a court order.

Finally, the interpretation of Rule 6(e)(3)(A)(i) urged by the Solicitor General is unreasonable because it leads to a total erosion of Rule 6(e)(3)(A)(ii). The main case relied upon by the Solicitor General, *In re Grand Jury (LTV)*, 583 F.2d 128 (5th Cir. 1978), demonstrates this. The case involved a request by government civil attorneys and technical experts for access to grand jury material. The Fifth Circuit interpreted Rule 6(e)(3)(A)(i) to allow the government attorneys access to the grand jury materials without a court order. The court then granted an order for disclosure to the technical experts, reasoning that since the civil attorneys already had the materials and they needed technical help, there was no reason not to disclose the materials to the technical experts.

In essence the Fifth Circuit opinion says that disclosure to technical experts in civil cases should be automatic since the civil attorneys already have the material. Given the premise the the

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[7]This is exactly what was done by the government in connection with the recent grand jury investigation of the tax affairs of General Motors Corporation. See *In re April 1977 Grand Jury Subpoenas, General Motors Corporation v. United States*, 573 F2d 936, 941 (6th Cir. 1978), *vacated on other grounds*, 584 F2d 1366 (6th Cir. 1978)(en banc).

Fifth Circuit began with, *i.e.*, that civil attorneys may get grand jury materials without a court order, this reasoning is logical. But the result is clearly contrary to Congress' intent in 1977. Congress wrote the rule to allow automatic disclosure to technical experts assisting attorneys doing *criminal* work, but requiring a court order before such experts could get access to assist attorneys doing civil work. Congress certainly did not intend that obtaining such an order would be automatic, or it would have said so. The problem is not with the Fifth Circuit's reasoning, but with its initial premise that Rule 6(e)(3)(A)(i) should be interpreted to allow government attorneys doing civil work access to grand jury materials without a court order. Both the civil attorneys and the technical experts assisting them should have been required to obtain a court order before getting access to the grand jury materials.

The interpretation of Rule 6(e) that is reasonable, and that should be attributed to Congress, is one that makes a distinction between attorneys doing criminal work and attorneys doing civil work. After all, the grand jury is a *criminal* investigatory tool. Government attorneys and technical experts doing criminal work should have access to grand jury material without a court order. Government attorneys and technical experts doing civil work should not. This is the only reasonable distinction to be made, and is the one that should be attributed to Congress.

C. Public Policy Considerations Do Not Support Allowing Justice Department Attorneys Handling Civil Matters Absolute And Unrestricted Access To Grand Jury Materials.

The interpretation of Rule 6(e) urged by the Solicitor General is contrary to public policy because it encourages grand jury abuse. By allowing grand jury material to be freely used by attorneys working on civil cases the Solicitor General's interpretation creates an enormous temptation for government attorneys to use the grand jury to gather information for civil purposes.

For example, suppose the government is conducting an investigation of the tax affairs of a corporate taxpayer. If the investigation is into possible civil violations, the proper investigatory tools are administrative summonses. Only if the investigation is of possible criminal violations may the grand jury be used.

But if the government attorneys conducting the investigation know that all the documents and testimony from a grand jury will be available to them in the civil case, there will be an enormous temptation to use a grand jury. Even if no evidence of criminal violation is found, there may be a wealth of material available to be used for civil purposes.

Or suppose that a legitimate criminal investigation is being conducted using a grand jury. During the course of the investigation the government attorneys conducting it come to believe that there were possible violations in years where no criminal prosecution is possible because the statute of limitations for criminal prosecution has expired. Suppose further that because of waivers or other reason, the statute of limitations for civil purposes has not yet expired. Again, unrestricted disclosure to civil attorneys would create an enormous temptation for those attorneys to use the grand jury not only to gather evidence of criminal violations in the relevant years, but to also gather evidence relevant to a civil case for the prior years.

The two preceding examples are, unfortunately, not absurd conjecture, but distinct possibilities. Miller has contended that the grand jury investigation conducted of its affairs was used in either or both of these ways. Of course, the merits of Miller's claim are not before this Court. The point is that abuse of the grand jury is very possible and is encouraged by the interpretation of Rule 6(e) urged by the Solicitor General.

The Solicitor General argues that unrestricted access to grand jury materials by civil attorneys does not violate the

policy considerations behind the rule of grand jury secrecy, because these government attorneys will not publicly disclose the information released to them. However, the material will be publicly disclosed if it is ever used in a civil proceeding. In fact, the only times there will not be disclosure is where the government attorneys obtain the material only to find that there is no civil case.

More importantly, the Solicitor General's argument misses the point. Abuse of the grand jury occurs when it is improperly used to gather evidence in a civil matter regardless of whether that evidence is ever publicly disclosed.

The grand jury holds a special place in American jurisprudence. It is invested with enormous investigatory powers precisely because those powers are limited to the investigation of criminal activity. The grand jury's role is confined to conducting investigations that are *exclusively* criminal. *United States v. Doe*, 341 F. Supp. 1350, 1352 (S.D. N.Y. 1972). Use of the grand jury's enormous powers to gather evidence for civil purposes is an abuse of the grand jury. Requiring government attorneys wishing to use the fruits of a grand jury investigation for civil purposes to obtain a court order is a protection against such abuse. That is why the 9th Circuit interpreted Rule 6(e)(3)(A)(i) the way it did, and why this Court should affirm that interpretation.

This point was recently made by the Fourth Circuit in *In re Grand Jury Subpoenas, April, 1978, at Baltimore*, 581 F.2d 1103 (4th Cir. 1978), *cert. denied sub nom. Fairchild Industries, Inc. v. Harvey*, 440 U.S. 971 (1979). The court there refused to interrupt an ongoing grand jury investigation to entertain allegations that the government was abusing the grand jury by using it for civil purposes. The court held that the proper time to address such allegations is in connection with a government application for disclosure for civil purposes under Rule 6(e), which " . . . *requires a court order* predicated upon a demonstration

of good faith." *In re Grand Jury Subpoenas, April, 1978, at Baltimore, supra*, at 1110 (emphasis added).

If the Solicitor General's argument is accepted and no Rule 6(e) order is required before disclosure to attorneys doing civil work, then interlocutory challenges to grand jury investigations would have to be allowed. This is contrary to the well-recognized principle that courts should not intervene in the grand jury process absent compelling reason. *United States v. Dionisio*, 410 U.S. 1, 16-18 (1973). Interpreting Rule 6(e) to require a court order before allowing disclosure for civil purposes is a less drastic means to litigate charges of grand jury abuse. *See In re Grand Jury Subpoenas, April, 1978, at Baltimore, supra*, at 1108.

II. GOVERNMENT ATTORNEYS AND THEIR ASSISTANTS HANDLING CIVIL MATTERS MUST SHOW A PARTICULARIZED AND COMPELLING NEED BEFORE THEY ARE ENTITLED TO A COURT ORDER ALLOWING ACCESS TO GRAND JURY MATERIALS.

The second question raised in this appeal is the standard of need that the government must meet before its attorneys[8] and technical assistants are entitled to court ordered access to grand jury material pursuant to Rule 6(e)(3)(C)(i). The Ninth Circuit held, and Miller urges this Court to affirm, that the traditional standard of particularized and compelling need applies to government requests for disclosure of grand jury materials. The Solicitor General contends that a lesser standard should be applied to government requests under Rule 6(e)(3)(C)(i).

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[8]All parties agree that disclosure to technical assistants handling civil matters requires a court order under Rule 6(e)(3)(C)(i). If the court rejects the Solicitor General's interpretation of Rule 6(e)(3)(A)(i), as Miller urges, government attorneys handling civil matters are also required to obtain a court order.

A. The Traditional Standard Of Particularized And Compelling Need Applies To Government Requests For Disclosure Of Grand Jury Materials For Civil Use.

The Solicitor General is correct in pointing out that this Court has never specifically addressed the question of whether the particularized need standard applies to government requests for disclosure under Rule 6(e). However, this Court's decision in *Douglas Oil Company v. Petrol Stops Northwest*, 441 U.S. 211 (1979) reaffirmed the high value given to grand jury secrecy. *Douglas Oil, supra*, at 218-219. There is nothing in the *Douglas Oil* opinion or in any other opinion of this Court which supports the Solicitor General's contention that a lower standard should be applied to government requests.

In fact, the only time this issue has been addressed by a member of this Court is, once again, in the concurring opinion of Justice Whittaker in *United States v. Procter & Gamble*, 356 U.S. 677 (1958). Justice Whittaker, as noted in Part I, stated that government attorneys in civil cases have no absolute right to possess grand jury materials. Justice Whittaker would allow such government attorneys to have access to grand jury material upon obtaining a court order, but only after demonstrating particularized need.

> . . . I would adopt a rule requiring that the grand jury minutes and transcripts and all copies thereof . . . [be] subject to inspection by *any party* to such a civil suit only upon order of the court made, after notice and hearing, upon a showing of such *exceptional and particularized need* as is necessary to establish 'good cause', in the circumstances. . . . " *United States v. Procter & Gamble, supra*, at 685. (Emphasis added.)

The Solicitor General argues that government requests for disclosure need only be "rationally related" to a civil case.

However, the two Court of Appeals cases cited by the Solicitor General in support of this standard are not persuasive.

In re Grand Jury Subpoenas, April, 1978, at Baltimore, 581 F.2d 1103 (4th Cir. 1978), *cert. denied sub nom. Fairchild Industries, Inc. v. Harvey*, 440 U.S. 971 (1979), is not on point. The issue in that case was a motion to quash a grand jury subpoena on the ground that the grand jury investigation was being conducted in bad faith. The Fourth Circuit upheld the District Court's refusal to conduct a hearing on the allegations of bad faith. The court noted that the grand jury target could raise the bad faith issue again if the government brought a Rule 6(e) petition to obtain the grand jury materials for use in civil litigation. The Fourth Circuit obviously believed that *any* civil use of grand jury materials by government attorneys would require a court order, and that no court order should issue unless the government demonstrated good faith in conducting the grand jury. (See Part IC) However, nothing in the court's opinion suggests that good faith alone is sufficient to justify disclosure of grand jury materials to government personnel under Rule 6(e).

In re Grand Jury (LTV), 583 F.2d 128 (5th Cir. 1978) is also cited by the Solicitor General in support of the "rationally related" standard. As pointed out in Part I, that case (which was decided prior to *Douglas Oil*), interprets Rule 6(e)(3)(A)(i) to allow disclosure of grand jury materials to "attorneys for the government" conducting civil investigations without a Rule 6(e)(3)(C)(i) order. Proceeding from that premise, the Fifth Circuit concluded that the government need not demonstrate particularized need before disclosing grand jury materials to technical personnel assisting civil attorneys in their duties. The original premise of the Fifth Circuit is faulty, as shown above. The rationale of the rest of the opinion proceeds from that fault.

The precise question raised by this appeal was recently addressed by the Seventh Circuit in *In the Matter of Grand Jury Proceedings, Miller Brewing Company,* Nos. 81-2077, 81-2115 and 81-2407, Slip Op. (7th Cir. Sept. 3, 1982). The Seventh Circuit cited with approval the Ninth Circuit's decision below, and agreed that the appropriate standard is one which ". . . requires all parties to establish particularized need and which affords governmental agencies no special treatment." *In the matter of Grand Jury Proceedings, supra,* Slip Op. at 18.

B. *The Public Policy Reasons Behind Rule 6(e) Require Application Of The Particularized Need Standard To Government Requests For Disclosure.*

In *Douglas Oil Company v. Petrol Stops Northwest, supra,* this Court reiterated the five public policy reasons for the rule of grand jury secrecy. These include:

> . . . (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, . . . " *Douglas Oil, supra,* at 219, n. 10.

The Solicitor General argues that these policy reasons do not apply when the party seeking disclosure is the government. (Gov't Br., p. 43) According to the Solicitor General, the task of balancing the interests in grand jury secrecy is "fundamentally different", where the party seeking disclosure is the government. This argument ignores the fact that the interest in continued secrecy is unaffected by whether the party seeking disclosure is public or private.

First, the Solicitor General's argument that grand jury witnesses will not fear recrimination where the party seeking disclosure is the government is not valid. For example, witnesses

in tax grand juries such as the one which investigated Miller might fear harassment in the form of tax audits and tax assessments against them as a result of the disclosure of their testimony. In addition, disclosure to government personnel may very well result in public disclosure in the underlying civil action (disclosure under Rule 6(e)(3)(C)(i) must be "preliminarily to or in connection with a judicial proceeding"). Given the prospect of eventual public disclosure of their testimony which unrestricted access would precipitate, witnesses will be more reluctant to testify before the grand jury.

Second, disclosure of grand jury material to government personnel working on civil matters without a showing of particularized need undermines reason (5) given by the Supreme Court in *Douglas Oil*, protection of the innocent accused. This factor recognizes a *private* interest in continued secrecy. In Miller's case, no charges were brought against Miller, or any of its officers or employees. Nonetheless, under the Solicitor General's interpretation a wide range of government personnel would have access to the record of the grand jury proceedings, and the charges and accusations, however unwarranted, that were made. If the grand jury material were used in connection with a civil proceeding, these charges and accusations would become public.

There is an additional policy reason in favor of restricting government access to grand jury materials, especially in tax cases. As the Seventh Circuit recently noted, "[a] liberal disclosure policy in tax cases would no doubt facilitate tax collection but it would also create a temptation to abuse the grand jury process." *In re Special February, 1975 Grand Jury (Baggot)*, 662 F.2d 1232, 1237 (7th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3998.01 (U.S. June 21, 1982)(No. 81-1938). (*See also* Part IC above.) There is already a substantial temptation for the government to use the grand jury for the dual purposes of criminal and civil investigations, because of the possibility of a subsequent civil use of the grand jury material. Requiring a showing of particularized need before disclosure for civil purposes is allowed will at least tend to check that temptation.

The necessity for checking that temptation is demonstrated by cases such as Miller's and that of General Motors Corporation,[9] which are both examples of bold attempts by the government to use the grand jury process to gather evidence for civil tax purposes. The facts of the General Motors case indicate that from the outset of the grand jury investigation the Internal Revenue Service intended to gather evidence for civil tax purposes. The IRS assigned sixteen agents and an IRS attorney to the grand jury for that reason. Apparently, the IRS believed that court approval of its civil use of the grand jury material would be automatic.

Disclosure of grand jury material for civil purposes in cases like General Motors' and Miller's will be automatic if the government's position in this case is sustained. Obviously, the material will be "rationally related" to the civil investigation. Under the "rationally related" standard the use of grand juries to conduct civil tax investigations is likely to become commonplace. The grand jury process would become a civil as well as a criminal investigatory tool. This potential for grand jury abuse can only be prevented by requiring a showing of compelling and particularized need before grand jury material is available for civil use.

C. A Mere Showing That The Grand Jury Materials Are Rationally Related To Civil Matters Does Not Constitute Particularized And Compelling Need.

The Solicitor General also argues that even if the *Douglas Oil* standard of particularized need is appropriate, that standard is met where the government shows that the grand jury materials are "rationally related" to civil matters.

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[9] *In re April 1977 Grand Jury Proceedings, United States v. General Motors Corporation*, 506 F. Supp. 1174 (E.D. Mich. 1981) *appeal pending* No. 81-1182 (6th Cir.).

The "rationally related" standard proposed by the Solicitor General is really no standard at all. It is hard to imagine why civil attorneys would seek grand jury materials, unless they were somehow rationally related to civil work the attorney was doing. The "rationally related" standard would only protect against disclosures sought out of idle curiosity or capriciousness by government personnel. Certainly Rule 6(e)(3)(C)(i) is intended to do more than that.

Prior cases interpreting the "particularized and compelling need" standard have emphasized that the standard requires some special showing of need. *See, e.g., United States v. Sobotka*, 623 F.2d 764, 768, n. 5 (2d Cir. 1980) ("We note that no compelling necessity for disclosure is shown where it is merely easier or less expensive for the party seeking disclosure to have the full grand jury transcript at its disposal."); *Hancock Bros., Inc. v. Jones*, 293 F. Supp. 1229, 1232 (N.D. Cal. 1968) ("Mere convenience is not enough to encroach upon the secrecy of grand jury proceedings."); *State of Minnesota v. United States Steel Corporation*, 44 F.R.D. 559, 581 (1968) (petition for disclosure to government agency denied because "mere savings of monetary burden would not suffice to bring the court's discretion into play under Rule 6(e)"); *In re Holovachka*, 317 F.2d 834, 837-838 (7th Cir. 1963) ("The convenience of discovery by access to grand jury minutes has never been regarded as sufficient cause to lift the secrecy of grand jury proceedings"); and *Application of State of California*, 195 F. Supp. 37, 41 (E.D. Pa. 1961) ("It would seem that the only reasons for disclosure here are the avoidance of expense and additional work. . . . These do not outweigh the policy of secrecy.").

The Solicitor General argues that a lower standard is necessary to promote government enforcement of *civil* statutes through the use of grand jury materials. The Solicitor General seems to have lost sight of the fact that enforcement of civil statutes is *not* the function of the grand jury, nor is it the policy

behind Rule 6(e). Congress has already provided that government with the tools it deems necessary for civil enforcement.

The Solicitor General wishes to extend the use of the grand jury beyond its intended purpose and use it for civil purposes. Congress has wisely continued the historical practice of restricting the enormous powers of the grand jury to *criminal* investigations. This Court should not interpret Rule 6(e) contrary to Congress' intention.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Dated: November 12, 1982.

Respectfully submitted,

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U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

June 10, 1982

Donald K. Schott, Esquire
Quarles & Brady
780 North Water Street
Milwaukee, Wisconsin 53202-3589

Re: United States v. Sells Engineering, Inc., et al.,
No. 81-1032

Dear Mr. Schott:

In response to your letter of June 7, 1982, I hereby consent, on behalf of the United States, to the filing of a brief amicus curiae on behalf of Miller Brewing Company in this case.

Sincerely,

Rex E. Lee
Solicitor General

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July 19, 1982

Thomas J. Donnelly, Esq.
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Re: United States of America v.
Sells Engineering, Inc. et al.
Supreme Court of the United States
No. 81-1032

Dear Mr. Donnelly:

Your letter of July 15 requesting consent to an amicus curiae brief being filed on both questions has been received. We hereby consent to your request to address both issues raised by the government. We understand that this brief will be supportive of our position as to both issues.

Very truly yours,

SHENAS, ROBBINS, SHENAS & SHAW

A. R. Robbins

ARR:lr

cc: E. Mac Amos, Jr.

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July 21, 1982

Thomas J. Donnelly, Esq.
QUARLES & BRADY
780 North Water Street
Milwaukee, WI 53202

Re: U.S.A. v. Sells

Dear Mr. Donnelly:

On behalf of Peter A. Sells and Sells Engineering, Inc., I consent to the filing of an amicus brief by Miller Brewing Company in the above case. It is my understanding that your amicus brief will address both questions presented in the Government's petition and I consent to the filing of your brief with respect to both questions.

Yours very truly,

JENNINGS, ENGSTRAND & HENRIKSON
A Professional Law Corporation

R. MAC AMOS, JR.

RMA/mmk

cc: Ray Robbins, Esq.

Docket Sheet

NO. 81-1032-CFX	TITLE	United States, Petitioner v. Sells Engineering, Inc., et al.

DOCKETED	COURT
Dec. 2, 1981	United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Solicitor General
	Counsel for Respondents: A. R. Robbins,
Oct. 23, 1981	Application for an extension of time to file petition for writ of certiorari and order granting same until Dec. 2, 1981, by Rehnquist, J, Oct. 27, 1981
Dec. 2, 1981	Petition for writ of certiorari filed.
Dec. 28, 1981	Order extending time for all respondents to file a response to the petition until Feb. 1, 1982.
Jan. 27, 1982	Order extending time for all respondents to file a response to the petition until Feb. 8, 1982.
Feb. 17, 1982	DISTRIBUTED. 3-5.(Stricken)
Mar. 2, 1982	Response requested.
Mar. 15, 1982	Order further extending time for all respondents to file a response to the petition until March 29, 1982.
Mar. 31, 1982	Brief for the respondents in opposition filed.
Mar. 31, 1982	DISTRIBUTED. 4-16.
Apr. 14, 1982	Reply brief for the U. S. filed. (D).
Apr. 16, 1982	Memorandum on question of mootness requested.
Apr. 26, 1982	Supplemental memorandum on question of mootness by the United States filed.
Apr. 26, 1982	Supplemental memorandum on question of mootness by respondents Fred Witte, B&W Investments and Center Glass Co. filed.
Apr. 27, 1982	DISTRIBUTED. 4-30.
May 3, 1982	Petition GRANTED.

June 17, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until July 17, 1982.
July 19, 1982	Order further extending time to file the joint appendix and petitioner's brief on the merits until Aug. 6, 1982.
Aug. 4, 1982	Brief, amicus curiae, of The District Attorney of Suffolk County, New York, in support of petitioner filed.
Aug. 6, 1982	Joint appendix filed.
Aug. 6, 1982	Brief for petitioner U.S. filed.
Aug. 20, 1982	Order extending time to file the respondents' brief on the merits until October 11, 1982.

(OVER)

81-1032

Title

No.

DATE	PROCEEDINGS AND ORDERS
Sept. 29, 1982	Order extending time to file the respondents' brief on the merits until Nov. 12, 1982.
Oct. 12, 1982	Application for leave to file respondents' brief on the merits in excess of page limitations, and order denying same by Rehnquist, J., 10/13/82.
Nov. 5, 1982	Brief, amicus curiae, of The American Bar Association in support of respondents filed.
Nov. 12, 1982	Brief, amicus curiae, of The Miller Brewing Company filed.
Nov. 12, 1982	Brief, amicus curiae, for General Motors Corporation filed.
Nov. 15, 1982	Brief for the respondents filed.
Nov. 15, 1982	Brief, amici curiae, for The American Civil Liberties Union Foundation, et al. filed.
Dec. 14, 1982	CIRCULATED.
Feb. 23, 1983	Reply brief for the U. S. filed. (D).
March 2, 1983	ARGUED.